Petition

81-1966

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

BELKNAP, INC., PETITIONER

v.

DUWAINE E. HALE; MICHAEL WINBURN; JOSEPH JOHNSON, III; MICHAEL SIMMONS; MARK BAGSHAW; JIM CARLISLE; CHRIS JONES; JOHN MARSHALL; EUGENE BELL, III; DAN J. STEMMLE; GEORGE BOGGS; AND PAUL LOGSDON, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KENTUCKY

SMITH, CURRIE & HANCOCK

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KENTUCKY

Belknap, Inc., by and through its attorneys of record, hereby petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of the State of Kentucky in this case.

QUESTION PRESENTED

Whether the courts of the State of Kentucky have the power to assume jurisdiction over the employment rights of striker replacements, an area of labor relations preempted by Federal law.

OPINIONS BELOW

None of the opinions rendered by the various courts of the State of Kentucky is reproduced in either an official or unofficial reporter. All opinions are fully reproduced in the appendix to this petition and will be identified, *infra*.

JURISDICTION

On April 24, 1981, the Kentucky Court of Appeals determined that the courts of that State had jurisdiction to adjudicate the employment rights of striker replacements. The petition of

Belknap, Inc. to the Kentucky Supreme Court for review of this decision was ultimately denied on February 16, 1982. The jurisdition of this Court is invoked under 28 U.S.C. 1257(3).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.)*, are as follows:

> Section 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engaged in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all of such activities . . .
>
> Section 8(a). It shall be an unfair labor practice for an employer –
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of this title;
>
> . . .
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .
>
> . . .
>
> (5) To refuse to bargain collectively with the representatives of his employees . . .
>
> Section 8(b). It shall be an unfair labor practice for a labor organization or its agents –
>
> (1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7 of this title . . .
>
> (2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . .
>
> Section 10(a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting

commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . .

STATEMENT OF THE CASE

On February 1, 1978, approximately 400 employees of Belknap, Inc. went on strike as the result of an impasse in collective bargaining negotiations between Belknap[1/] and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 89,[2/] the Union certified as the exclusive bargaining representative of the Petitioner's employees. Shortly thereafter, the Petitioner ran advertisements in a local newspaper to obtain replacements for the employees out on strike, and several replacements were hired pursuant to the Petitioner's advertising efforts. (R. 85).[3/]

During the pendency of this strike, which lasted over five months, the Petitioner and the Union filed various unfair labor practice charges against each other with the National Labor Relations Board, Region Nine, in Cincinnati, Ohio. The Regional Director found all of the charges filed by the Union to have been without merit and thus dismissed them accordingly. However, the Regional Director was of the opinion that a wage increase instituted by the Petitioner at the outset of the strike constituted an unfair labor practice, and it was further alleged that this action by the Petitioner converted the strike from an economic strike unto an unfair labor practice strike. (R. 83).

On July 17, 1978, representatives of the Petitioner and the Union met at the request of Regional Director Emil C. Farkas at the Board's offices in Cincinnati, Ohio, to attempt settlement of the strike and the pending unfair labor practice complaints. (R. 85-86). At this meeting, which was attended and actively participated in by Regional Director Farkas and three of his

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1/ Hereinafter referred to as "Petitioner" or "Company".

2/ Hereinafter referred to as "Union".

3/ This designation refers to the record as it was presented before the Supreme Court of Kentucky.

staff attorneys, the Board urged settlement of the strike with the understanding that settlement would result in the dismissal of all outstanding unfair labor practice charges and complaints. (R. 86).

At the settlement conference, one of the principal items of disagreement was with regard to the reinstatement of the Petitioner's striking employees. In prior negotiations between the parties, the Union had demanded the immediate reinstatement of all strikers as a condition of settlement, a proposal which the Petitioner repeatedly rejected. However, due largely to the conciliation efforts of the Board at the settlement conference, both parties conceded their original positions and it was agreed to recall the striking employees at a rate of 35 employees per month (Pet. App. E, at 3-4). As a result of agreement on this issue, a settlement agreement was reached and signed by the parties, the strike was ended and the pending unfair labor practice charges and complaints were dismissed. (R. 87-88, 97-101).

In order to fully implement the recall provision of the settlement agreement, it was necessary for the Petitioner to lay off certain of the replacement employees hired by the Company to operate its business during the strike. (R. 88). All laid off replacements were informed in writing that they had the right to be reconsidered for employment once the striking employees were recalled, and the Petitioner honored this committment to the extent that it was feasible. (R. 87-88). As a result of the recalls, the Respondents, who were laid off in accordance with this agreement, filed suit in the Circuit Court of Jefferson County, Kentucky, alleging state claims for fraud, misrepresentation and breach of contract (Pet. App. A).

The Petitioner first raised the issue of preemption of these state claims at the trial court level, and the Jefferson Circuit Court granted the Petitioner's motion for summary judgment in this regard, holding that the preemption of these claims required a finding that the Petitioner was entitled to judgment as a matter of law (Pet. App. B).[4/]

4/ Neither the motion for summary judgment nor the Order of the Circuit Court granting the motion discusses the preemption issue. However, the Petitioner's brief in support of its motion for summary judgment specifically raises this issue, and it is upon this ground that summary judgment was granted. The Petitioner's brief in support of its summary judgment motion can be found in the record at pages 51-83.

The Respondents, rather than seeking redress in an appropriate Federal forum, appealed the ruling of the Circuit Court to the Kentucky Court of Appeals. That Court reversed, holding that a determination of the employment rights of striker replacements was not preempted by Federal law and was properly before the Circuit Court. The case was thus remanded to the trial court on April 24, 1981 (Pet. App. C).

The Petitioner disagreed with this ruling and sought discretionary review from the Supreme Court of Kentucky. That Court originally granted the request for review; however, after briefs had been filed on the matter, including a brief filed on the Company's behalf by the NLRB as *amicus curiae*, and oral arguments were heard, the Court decided that the review order had been improvidently granted. Thus, the order was vacated and the final order entered on the preemption issue on February 16, 1982 (Pet. App. D). As a result of this final order, the only avenue available to the Company was to petition this Court for a writ of certiorari to review the propriety of the ruling of the Kentucky Courts on the issue of preemption.

REASONS FOR GRANTING THE WRIT

1. This Court has mandated that the states not seek to regulate activity that is either arguably protected by Section 7 or arguably prohibited by Section 8 of the National Labor Relations Act, as amended (hereinafter the "Act"). *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). In those situations where it is unclear whether the conduct in question is governed by either Seciton 7 or Section 8, the states must yield initial determination of the character of the activity to the NLRB inasmuch as Section 10 of the Act invests the Board with exclusive jurisdiction over unfair labor practices. As articulated by this Court:

> [I]t is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power *and state jurisdiction too must yield to the exclusive primary competence of the Board.*

San Diego Building Trades Council v. Garmon, supra, at 244-245 (emphasis added).

It is submitted that in the instant case, every claim asserted by the Respondents in the Circuit Court of Kentucky concerns activity which is either arguably protected or prohibited by the Act, and thus the attempt by the Kentucky Courts to subject such activity to state regulation constitutes an impermissible invasion of the exclusive jurisdiction of the Board.

As demonstrated by the *amicus* brief filed by the NLRB in the Supreme Court of Kentucky, the offers of employment to applicants as "permanent replacements" for the Petitioner's striking employees arguably violated of Section 8(a)(1) of the Act (Pet. App. F). This, however, involves a threshold determintion of whether, at the time the offers were made, the strike was an economic or an unfair labor practice strike. If it is determined that the strike was an unfair labor practice strike, then the Petitioner would have had no right to hire permanent replacements, and the assurance of permanet employment to replacements would have violated the Act. *NLRB v. Laredo Coca-Cola Bottling Co.*, 613 F.2d 1338 (5th Cir. 1980), *cert. denied*, 449 U.S. 889; *Carpenters District Council of Jacksonville*, 221 N.L.R.B. 876 (1975).[5/]

Similarly, when the Respondents were laid off in order to offer reinstatement to the Petitioner's striking employees, this involved conduct which, again depending upon the legal character of the strike, was either clearly required or arguably prohibited by the Act. This is true because, if the strike was an unfair labor practice strike, the Petitioner was required to offer the strikers reinstatement to their former positions, *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956), and the failure to provide for their reinstatement, even if this required discharging all striker replacements, would have violated both Section 8(a)(1) and Section 8(a)(3) of the Act. *NLRB v. Top Mfg. Co. Inc.*, 594 F.2d 223, 225 (9th Cir. 1979). Moreover, the Petitioner's striking employees were recalled pursuant to the express terms of a strike settlement agreement, and, if the Petitioner had refused to reinstate the strikers after the settle-

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5/ Without belaboring the underlying merits of the state claims, it is obvious that if the strike was economic, then the Petitioner would have had the legal right to advertise for and hire permanent striker replacements, and thus there would be no basis for the allegation that the Petitioner misrepresented the legal character of the employment offers.

ment was reached, this would have constituted a violation of Section 8(a)(5) of the Act, regardless of the legal character of the strike. Puritana Mfg. Corp., 159 N.L.R.B. 518 (1966).

As the Board further pointed out in its *amicus* brief, the above circumstances would give rise to the requirement by Federal law that the replacements be terminated, and thus the allowance of a state cause of action by the Respondents for damages as a result of their federally required discharges presents a clear conflict in Federal and state regulation of the same conduct (Pet. App. F). Preemption in such cases is mandated. *San Diego Building Trades Council v. Garmon, supra; Motor Coach Employees v. Lockridge,* 403 U.S. 274 (1971). Conversely, if the strike was an economic rather than an unfair practice strike, then the Respondents could proceed against the Petitioner under Section 8(a)(1) of the Act, since their discharges could arguably be said to have violated the Section 7 guarantee against interference with an employee's right to refrain from joining or assisting a labor organization.

In its opinion, the Kentucky Court of Appeals recognized that the NLRB has exclusive jurisdiction over unfair labor practices, but the Court, in holding the preemption doctrine inapplicable, decided initially that the conduct at issue could only be said to have arguably involved Section 8(a)(3) activity, and, secondly, that an analysis of the conduct required the conclusion that no Section 8(a)(3) violation had occurred (Pet. App.C,at 2-3). However, as discussed above, it is the Board's position that the allegations in this case involve possible violations not only of Section 8(a)(3), but also of Sections 8(a)(1) and 8(a)(5), and, as will be discussed, *infra,* of Sections 8(b)(1)(A) and 8(b)(2) as well (Pet. App. F). Again, it is within the exclusive jurisdiction of the NLRB to make the initial determinations both as to what sections of the Act may arguably be applicable to a given set of facts, as well as to whether the activity ultimately is or is not an unfair labor practice within the meaning of the Act. *San Diego Building Trades Council v. Garmon, supra.*

In rendering its decision that this case was not subject to the application of the preemption doctrine, the Court of Appeals relied on the language in *Linn v. United Plant Guard Workers,* 383 U.S. 53 (1966), which allows limited intrusion by the states into matters involving great local feeling when such matters are

of peripheral concern to the NLRB and to the proper administration of the Act (Pet. App. C, at 3-4). The Kentucky Court, as justification for its grant of authority to the Circuit Court to proceed with a trial on the merits of the state claims, held that the matters involved were "clearly" of peripheral concern to the Board (Pet. App. C, at 3). As demonstrated by the Board in its *amicus* brief to the Kentucky Supreme Court, the agency considers preemption of the state claims essential to the preservation of its exclusive jurisdiction over unfair labor practices (Pet. App. F). Thus, in addition to the need for this Court to determine whether the preemption doctrine should be applied in this case, certiorari should be granted in order for the Court to determine whether the holding in *Linn* allows the states generally to dictate to the NLRB which matters are and are not of peripheral concern to it, and, specifically, whether the Kentucky Courts were free to decide that direct encroachment by the State into the exclusive jurisdiction of the NLRB over unfair labor practices is a matter of peripheral concern to the Board.

2. This Court has held that the states are preempted from regulating conduct which, although neither specifically protected nor prohibited by the Act, was nevertheless intended by Congress to be left unregulated and controlled by the free play of economic forces. *Lodge 76, Int'l Assn. of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, 426 U.S. 132 (1976). In this regard, although collective bargaining is clearly the favored means of peacefully resolving disputes as to wages, hours, and other terms and conditions of employment, it was the intent of Congress in enacting a comprehensive body of laws regulating the area of labor relations that, when the bargaining process proved unsuccessful and resort to economic pressure became necessary, there be a rough balance in the arsenal of economic weapons available to management and labor. *American Shipbuilding Co. v. NLRB*, 380 U.S. 300, 316 (1965); *Carpenters Union v. NLRB*, 357 U.S. 93, 99-100 (1958).

The fundamental economic weapon at the disposal of labor is the right to strike when collective bargaining negotiations break down. *NLRB v. International Rice Milling Co.*, 341 U.S. 665 (1957). To counterbalance this weapon, employers have the right, during an economic strike as opposed to an

unfair labor practice strike, to hire permanent striker replacements. *NLRB v. Mackay Radio & Telephone Co.*, 304 U.S. 333 (1938). In the instant case, state regulation of the employment rights of striker replacements has the clear potential of disrupting the balance of economic weapons contemplated by the Act. If the state claims involved herein are found not to be preempted, employers will be severely limited in the exercise of their federally protected right to hire permanent replacements. This is true because, in those situations where it is not clear whether a strike will ultimately be found to have been an unfair labor practice strike as opposed to an economic strike at the time replacements were hired, employers would face the spectre of being forced by Federal law to discharge replacements in order to recall the unfair labor practice strikers only to be subjected thereafter to substantial financial liability as the result of a state cause of action which arose because of the employer's compliance with the requirements of Federal law. This conflict in state and Federal regulation of the same conduct, the freedom of the states to disrupt the balance of economic weapons contemplated by the Act, and the necessary implication by the Kentucky Court of Appeals and the Supreme Court of Kentucky that the delicate balance of economic weapons is a matter of peripheral concern to the NLRB requires consideration by this Court.

3. Whatever employment understandings the Respondents may have had with the Petitioner were superseded to the extent they conflicted with the terms of the settlement agreement entered into between the Petitioner and the Union. The Union, as the certified bargaining represesentative of the Petitioner's employees, was the exclusive bargaining agent for both the striking employees as well as for their replacements. *Leveld Wholesale, Inc.*, 218 N.L.R.B. 1344, 1350 (1975). It is a basic tenet of the exclusivity principle that incidents of employment individually bargained with unit employees are superseded to the extent they conflict with the terms of a collective bargaining agreement negotiated thereafter by the employer and the exclusive bargaining representative. *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

The collective bargaining agreement in the instant case provided for the recall of striking employees at a rate of 35 employees a month. This was to be accomplished even if it

required the termination of striker replacements (Pet. App. E, at 4-5). Thus, even could it otherwise be successfully argued that the respondents had individual commitments guaranteeing them permanent employment, such guarantees would directly contradict the terms of the settlement agreement. This Court needs to determine whether Federal law preempts the State of Kentucky from allowing a cause of action for the alleged breach of a provision in an individual employment contract to survive when that provision has been superseded by an express term of a collective bargaining agreement.

4. The settlement agreement requiring reinstatement of the striking employees was arrived at by the parties largely through the negotiation and conciliation efforts of the NLRB. In exchange for this agreement, the Board agreed to dismiss all existing unfair labor practice charges and complaints lodged during the pendency of the strike.

The Act is primarily designed not only to regulate the labor practices of the unions and of management, but also to encourage and promote collective bargaining as a means of achieving the peaceful resolution of industrial disputes. The Board is primarily responsible for administering the Act and for assuring that the policies of the Act are not frustrated. *American National Insurance Co.*, 343 U.S. 395 (1952); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

If the states are allowed to award damages to striker replacements who are discharged pursuant to a strike settlement agreement, especially one counselled and supported by Board, then employers will be discouraged from ever agreeing to recall striking employees, a matter of obvious significance to the striking union. Additionally, employers will be forced to litigate unfair labor practice complaints issued during a strike in which permanent replacements have been hired, since employers will be compelled to try and establish that the strike was economic. Only by successfully so doing would employers be able to comply with Federal law in retaining the striker replacements and, at the same time, avoid the risk of financial liability which could result from an adverse decision grounded in a claim for relief under state law.

Certiorari should be granted in order for this Court to determine whether the states are free to decide that state claims may

survive even when they discourage the collective bargaining process, and whether the states are free to interfere with the Board's administration of the Act by forcing the agency to allocate more of its time to litigating rather than settling unfair labor practice complaints.

5. The Kentucky Court of Appeals, in deciding that the conduct alleged by the Respondents did not give rise to application of the preemption doctrine, relied on *Linn v. Plant Guard Workers Union, supra,* as justification for its cursory holding that the state claims involved matters of great local concern. The entire chain of reasoning in support of this finding is embodied in the Court's opinion as follows:

> The appellants were hired by the appellee with the promise that they would be permanent employees. As a result of the bargaining agreement entered into between the striking employees and the appellee, the appellants were forceably laid off. Clearly, such alleged action on the part of the appellee is a merely peripheral concern of the N.L.R.B. Conversely, the alleged behavior greatly involves local feeling and responsibility that should be subject to the jurisdiction of the state courts.

(Pet. App. C, at 3)

It is submitted that the Kentucky Court misconstrued the meaning and scope of the *Linn* decision in finding the instant case not preempted. *Linn* involved a situation where the general manager of a company was allegedly subjected to malicious libel during a representation election campaign. The Supreme Court held that the exception carved out in *San Diego Building Trades Council v. Garmon, supra,* to allow limited state jurisdiction over labor matters involving intimidation and threats of violence, should be extended to cover situations involving allegations of malicious libel.

The Court in *Linn* stressed the fact that its extension of the *Garmon* exception was predicated on the consideration that the Board had already evaluated and dismissed the charges filed pursuant to the applicable provisions of the Act. It was noted that, under the specific fact situation presented by the case, the Board was powerless to provide any means by which redress

for this malicious libel could be sought. As articulated by the Court:

> The Board can award no damages, impose no penalty, or give any other relief to the defamed individual.
>
> On the contrary, state remedies have been designed to compensate the victim and enable him to vindicate his reputation. The Board's lack of concern with the "personal" injury caused by malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary arguments for preemption.

Linn v. United Plant Guard Workers, supra, at 63-64.

The concern expressed by this Court in the *Linn* case with the inability of the Board to provide a remedy for the wrong there alleged is not a factor militating against preemption in the case at bar. As demonstrated by the Board in its *amicus* brief, in addition to the various charges available to the Respondents against the Petitioner under Section 8(a) of the Act, the Respondents also have the option of pursuing claims against the Union through the filing of Section 8(b)(1)(A) and 8(b)(2) charges with the Board, and, since the Union was under the affirmative duty to represent the interests of the striker replacements fairly and non-discriminatorily during the strike settlement negotiations, the Respondents likewise have available the option of filing a lawsuit in either state or Federal court against the Union for a breach of its duty of fair representation (Pet. App. F). *See, Vaca v. Sipes,* 386 U.S. 171 (1967).

The rationale for allowing limited state intrusion into preempted areas in those rare situations involving matter of great local feeling and concern is not applicable to the instant case. The alleged wrongs are fully remediable through the operation of Federal law in an appropriate Federal forum. To allow the state claims to survive would be a license for the states to circumvent application of the preemption doctrine whenever a party to a labor dispute is able to produce a pleading which articulates a cause of action under state law. In other words, if preemption is defeated in a case such as this, where Federal remedies exist under the Act, then the states would be free to claim that any alleged tort or breach of contract constitutes a matters of great local feeling, and thus the determination as to which matters are and are not preempted by the Act would, in

reality, be left almost entirely to state determination. Certiorari should be granted in this case primarily to determine whether the Kentucky Courts exceeded the scope of the aforementioned exception to the preemption rule as enunciated by this Court in the *Garmon* and *Linn* cases. On a more fundamental level, however, this case should be heard in order for the Court to more narrowly delineate the extent to which the states can utilize the "state interest" rationale as a means of assuming jurisdiction over matters otherwise preempted by the Act.

6. The question of whether the state claims are preempted needs to be addressed by this Court before the matter is allowed to proceed to trial in the Kentucky Circuit Court. In its present posture, the ruling of the Kentucky Court of Appeals, as endorsed by the Supreme Court of that state, has removed from the NLRB the initial determination of whether the actions complained of are protected or prohibited by the Act. As discussed above, such initial determination is within the exclusive jurisdiction of the Board. *San Diego Building Traders Council v. Garmon, supra;* National Labor Relations Act § 10(a), 29 U.S.C. § 160(a).

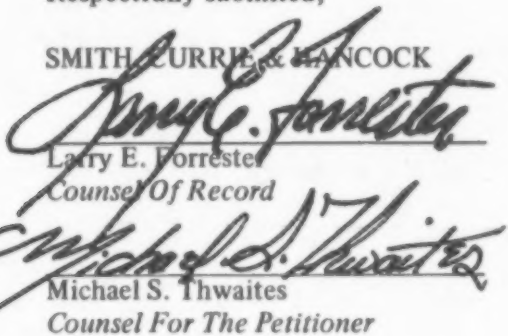
In this regard, it is well settled that when the highest court of a state enters a final order conferring jurisdiction upon a trial court of that state over an issue alleged to be preempted by the NLRA, then the jurisdictional question is ripe for review by this Court and should be heard before further proceedings are allowed to take place at the state level. *Local No. 438, Construction & General Laborers' Union, AFL-CIO v. Curry*, 371 U.S. 542, 548-49 (1963). Moreover, even assuming that the Petitioner were to prevail at a trial on the merits of the state claim, this would not alter the fact that the State of Kentucky considers itself an appropriate forum for adjudication of the employment rights of striker replacements. The ability of employers to utilize the economic weapon of hiring permanent replacements during a labor strike is now and will continue to be substantially impaired until this Court decides whether the area is preempted by Federal Law.

CONCLUSION

Based on the foregoing arguments and upon the authorities cited, the Petitioner submits that its petition for a writ of certiorari to the Supreme Court of the State of Kentucky should be granted.

Respectfully submited,

SMITH, CURRIE & HANCOCK



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Appendix

APPENDIX A

Jefferson Circuit Court Division

No. 78C110337

PLANTIFFS

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– and –

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–– and –

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VS.

BELKNAP, INC., DEFENDENTS
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Louisville, Kentucky 40202)

COMPLAINT

* * * * * * * * * * *

The Plaintiffs herein, for their cause of action state as follows:

1. That the Plantiffs herein and each of them are members of a class so numerous that joinder of all members is impracticable and there are questions of law or fact common to said class and under the provisions of KRS 23.01 and Sections thereafter, they are entitled to maintain a cause of action as representative parties on behalf of all members of the said class, and that the claims of the representative parties are typical of the claims of the class and said representative parties will fairly and adequately protect the interest of said class.

2. That the Defendant, Belknap, Inc., is a corporation operating under the laws of the Commonwealth of Kentucky whose process agent is designated as Charles P. Brewer, 111 East Main Street, Louisville, Kentucky 40202.

3. That the individual Plaintiffs above, and the members of the class they purport represent are all former employees of the Defendant herein whose employment has been terminated or will be terminated during the pendency of this action under claims and circumstances as herein set out below.

4. That on or about February, 1978, the Defendant herein advertised by local newspaper advertising for permanent employees, a copy of said advertisement being attached hereto and marked Exhibit "A".

5. That following the solicitation as set out in the aforegoing paragraph, the Plaintiffs herein and all members of the class

which they request to represent responded to the overtures set forth in said advertising and accepted permanent employment as employees of the Defendant herein.

6. That the terms of said employment were agreed upon by the Plaintiffs and members of the class and accepted by both the Plaintiffs and the class and the Defendant herein by documentation at the special insistence of Defendant specifically indicating the extent and duration of the employment and the type and classification of the employment and the identification of the former employee which these Plaintiffs and class were replacing as indicated by one sample of such documentation dated February 22, 1978, signed by the employee and witnessed by a representative of the Defendant, a copy being attached hereto and made a part hereof.

7. That in consideration of the aforesaid agreements, the Plaintiffs herein and the said class members performed their duties to the satisfaction of the Defendant herein and complied in all respects with the Defendant company's requirements of performance, probationary tenure, and successfully passed employment evaluation, reviews as set forth in company policy, directives and custom and in all other respects acquired the status of permanent employees of the Defendant corporation.

8. That at some point in time, subsequent to the hiring of the Plaintiffs and members of the class and prior to the date of their individual terminations, the Defendant, Belknap, Inc., entered into a written contract with a third party by the terms of which contract the Defendant, Belknap, Inc., obligated itself to discharge all of the employees of Plaintiffs class so hired as set out above subsequent to the initiating of advertising for permanent employees as set out above.

9. That at a time beginning approximately August, 1978 and extending through the date of the filing of this action, the Defendant, Belknap, Inc. has embarked upon a systematic discharge of Plaintiffs and members of their class under terms and conditions more effectively described by a sample of such discharge notice dated September 29, 1978, a copy of which is attached hereto and marked Exhibit "C".

10. That the Defendant, Belknap, Inc., in the alternative, either never intended to hire permanent employees and made false representations in that regard as set out above knowing that those fale representations would be acted upon by the

Plaintiffs and members of the class and that such action would be to their detriment and that the Plaintiffs and the class would subsequently be injured thereby or in the alternative did enter into a contract for permanent employment of the Plaintiffs and their class and subsequently breached that agreement by a deliberate act of entering into an irreversible agreement with the third party knowingly and willingly which obligated said Defendant, Belknap, Inc., to deliberately breached said contract and/or agreement with Plaintiffs and their class and thereby Plaintiffs and each of them and each member of said class was injured by reason of the destruction of an advantageous relationship to the extent of $200,000.00 each.

11. That in addition thereto, each Plaintiff and each member of the class so represented, has sustained addiional damage by way of loss of life insurance benefits, hospitalization benefits, retirement benefits, and such other fringe benefits of their particular jobs as were available to them during employment all to their detriment in the sum of $50,000.00 each.

12. That the actions complained of on the part of the Defendant, Belknap, Inc., were of such a willful, wanton, intentional and malicious nature as to warrant the assessment of punitive damages to the extent of $250,000.00 each and to the class members as they may appear entitled.

WHEREFORE, Plaintiffs, demand judgment against the Defendant herein as follows:

1. A determination by the Court that this a class action pursuant to Kentucky Rules of Civil Procedure 23, Class Actions.

2. Compensatory damages in the sum of $250,000.00 for each Plaintiff and each member of the class, said Plaintiffs may be allowed to represent pursuant to order of Court.

3. Punitive damages in the sum of $250,000.00 for each Plaintiff and each member of the class to which the Plaintiffs may be allowed by order of Court to represent.

4. Their costs herein expended and all further relief to which they may appear entitled, including a trial by jury on all issues so triable and a judgment for attorney fees to the extent that the Plaintiffs and class herein may appear entitled.

HANISH, DAVENPORT, ROSENBERG,
SCHILDKNECHT & WEINER

BY: _____

CECIL DAVENPORT
Attorney for Plaintiffs
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APPENDIX C

Commonwealth of Kentucky
Court of Appeals

FILE NO. 80-CA-1630-MR

DUWAINE E. HALE; MICHAEL WINBURN;
JOSEPH JOHNSON, III; MICHAEL SIMMONS;
MARK BAGSHAW; JIM CARLISLE; CHRIS JONES;
JOHN MARSHALL; EUGENE BELL, III; DAN J. STEMMLE;
GEORGE BOGGS; and PAUL LOGSDON, APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE RICHARD A. REVELL, JUDGE
CIVIL ACTION NO. 78-CI-10337

BELKNAP, INC., APPELLEE

REVERSING AND REMANDING

* * * * * * * * * * *

BEFORE, COOPER, GUDGEL, and VANCE, Judges.

COOPER, Judge. This is an appeal from a judgment for the appellee, defendant below, in an action for misrepresentation and breach of an employment contract. The issue is whether the trial court erred in determining that there existed no genuine issue as to any material fact and that the appellee was entitled to judgment as a matter of law. CR 56.03. On review, we reverse and remand.

The appellants, Duwaine E. Hale, Michael Winburn, Joseph Johnson, III; Michael Simmons; Mark Bagshaw; Jim Carlisle; Chris Jones; John Marshall; Eugene Bell, III; Dan J. Stemmle; George Boggs; and Paul Logsdon, filed this action against the appellee, Belknap, Inc., in December of 1978. The action alleged

APPENDIX B

Jefferson Circuit Court
Division Four (4)

No. 78CI 10337

DUWAINE E. HALE, ET AL, PLAINTIFF

vs.

BELKNAP, INC., DEFENDANT

ORDER FOR SUMMARY JUDGMENT AND JUDGMENT

This cause having come on to be heard on motion of defendant Belknap, Inc. for summary judgment pursuant to Rule 56 of the Kentucky Rules of Civil Procedure, and the Court having considered all matters of record properly before the Court on said defendant's motion for summary judgment, and the Court having found that there is no genuine issue of fact to be submitted to the Court or a jury, and having concluded that said defendant is entitled to judgment as a matter of law, it is hereby

ORDERED, that said defendant's motion for a summary judgment is in all respect granted, and it is further

ORDERED, ADJUDGED AND DECREEED, that this action be and the same is hereby dismissed, with prejudice, and that the defendant have and recover its costs from the plaintiffs.

Dated this 8th day of May, 1980.

JUDGE
JEFFERSON CIRCUIT COURT

fraud, misrepresentation, and breach of contract. The appellants were hired by the appellee as "permanent" replacement employees during a protracted strike by Local 89 of the Teamsters Union. The complaint alleged that the appellants were induced to accept employment in that this employment was characterized as permanent. Furthermore, the appellants alleged that the appellee breached the respective employment contracts by discharging the appellants and replacing them with the former striking employees subsequent to a settlement agreement entered into between the appellee and Local 89.

Thereafter, the appellee removed the action to the United States District Court for the Western District of Kentucky, asserting that Court's jurisdiction under the National Labor Relations Act, Title 29, U.S.C. §158(d). That Court, in determining that the action was a common law action for tortious interference with an employment contract, determined that it had no concurrent original jurisdiction. Accordingly, it remanded the action to the trial court. The appellee subsequently filed a motion for summary judgment, arguing that the substance of the appellants' claim was within the exclusive jurisdiction of the National Labor Relations Board. The trial court granted the appellee's motion and entered judgment for it. It is from this judgment that the appellants now appeal.

Under 29 U.S.C. §158, the N.L.R.B. has exclusive jurisdiction over "unfair" labor practices. In granting judgment for the appellee, the trial court effectively determined that the claim filed against the appellee constituted an unfair labor practice and thus was subject to the exclusive jurisdiction of the N.L.R.B. We disagree. Under §158 (a), an unfair labor practice is defined to include interference with an employee's right to bargain collectively. Arguably, the appellant's claim involves an unfair labor practice as defined in 29 U.S.C. §158 (a)(3):

> (a) It shall be an unfair labor practice for an employer
>
> . . . . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

Here, the actions allegedly engaged in by the appellee do not constitute an unfair labor practice as defined by subsection

(a)(3) of 29 U.S.C. §158. The appellants were non-union workers who sought full-time employment with the appellee, rather than membership in any particular labor organization. Furthermore, the alleged misrepresentation and breach of contract involved non-union individuals who were not parties to the collective bargaining agreement entered into between the appellee and Local 89.

In *Linn v. United Plant Guard Workers*, 383 U.S. 53, 15 L.Ed. 2d 582, 86 S. Ct. 657 (1966), the Court was confronted with the question of preemption as it involved the jurisdiction of the federal courts under the N.L.R.A. and the jurisdiction of the state courts over matters involving state interest. There, the Court stated, in part, as follows:

> The court has dealt with specific preemption problems arising under the National Labor Relations Act on many occasions, going back as far as *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740, 86 L. Ed. 1154, 62 S. Ct. 820 (1942). However, in framing the preemption question before us we need look primarily to *San Diego Building Trades Council v. Garmon*, 350 9 U.S. 236, 3L. Ed. 2d 775, 79 S. Ct. 773 (1959) . . . In this respect, the Court concluded that States need not yield jurisdiction 'where activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . [or] where the regulated conduct touched interest so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we would not infer that Congress had deprived the States of the power to act.' *Id.* at 243-244; 3 L. Ed. 2d at 781, p. 588.

In effect, the Court stated that in spite of the strong bias in favor of federal preemption, situations existed whereby federal jurisdiction must give way to that of the state. Here, such a situation exists. The appellants were hired by the appellee with the promise that they would be permanent employees. As a result of the bargaining agreement entered into between the striking employees and the appellee, the appellants were forcibly laid off. Clearly, such alleged action on the part of the appellee is a merely peripheral concern of the N.L.R.B. Conversely, the alleged behavior greatly involves local feeling and responsibility that should be subject to the jurisdiction of the state courts.

Without reaching the merits of the appellants' claim, we hold that the appellants are entitled to have their day in court. We quote with approval the language from *Jones v. General Tire and Rubber Co.*, 541 Fed. 2d 665 (1976):

> Reduced to its basic elements, the plaintiff here is merely claiming a right of action based upon state and common law theories of breach of contract. Whether the plaintiff can establish this claim is not before us, and should not have been before the district court, because the claim in no manner hinges on a violation of a contract between the plaintiff's employer or its labor organization . . . [W]e are of the opinion that the plaintiff is entitled to have the determination of the merits of this case made in the form originally selected by him.

The judgment of the trial court is reversed, with directions that it reassume jurisdiction of the action, and allow the action to proceed on its merits.

ALL CONCUR.

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APPENDIX D

Supreme Court of Kentucky

81-SC-426-DG

BELKNAP, INC. MOVANT

ON REVIEW FROM COURT OF APPEALS
80-CA-1630-MR
(Jefferson Circuit Court No. 78-CI-10337)

vs.

DUWAINE E. HALE, Et al. RESPONDENTS

MEMORANDUM OPINION AND ORDER

The Court, having considered the briefs of movant and respondents and having heard oral argument in this matter, is of the opinion that discretionary review was improvidently granted.

This Court's order granting discretionary review is vacated and the case is remanded to the Court of Appeals for final disposition.

Palmore, C. J., Aker, Clayton, Stevens, Stephenson, and Sternberg, JJ., sitting. All concur.

ENTERED February 16, 1982.

Chief Justice

COUNCIL FOR MOVANT:

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APPENDIX E

MEMORANDUM OF AGREEMENT

THIS MEMORANDUM OF AGREEMENT, made and entered into this 17th day of July, 1978 by and between

BELKNAP, INC., hereinafter referred to as the "Company", and

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, hereinafter referred to as the "Union",

WITNESSETH:

WHEREAS, the Union is the collective bargaining representative of the Company's warehouse and maintenance employees at its facilities located at 111 East Main Street, Louisville, Kentucky, and

WHEREAS, the employees went out on a strike called against the Company by the Union on February 1, 1978 because of the failure of the Company and Union to reach agreement upon a collective bargaining agreement, and

WHEREAS, the Company and the Union have now reached agreement on a collective bargaining agreement and now desire to make a memorandum of the agreement reached between the parties,

NOW THEREFORE, the Company and the Union agree with each other as follows:

1. The Union agrees to the Company's Last and Best Proposal submitted to the Union on January 30, 1978 with the following changes, additions and modifications:

A. Paragraph 1B of the Company's Last and Best Proposal is amended so as to read as follows:

> "Any employee who works a total of 7 hours *(including overtime hours)* on the last scheduled workday prior to and the first scheduled workday after a holiday (including the last scheduled workday prior to and the first scheduled workday after a period of temporary layoff not to exceed 10 consecutive workdays as aforesaid) shall be considered to have worked the 'full' scheduled workday on each of those days".

B. The Company agrees to amend the proposal set forth in paragraph 2 of its Last and Best Proposal so as to change the word "minimum" in the new Section 4 of Article XI to read "maximum".

C. With regard to paragraph 6 of the Company's Last and Best Proposal, the Company and the Union have agreed that the contract shall become effective on July 17, 1978 and continue in full force and effect through midnight on January 31, 1982.

D. The Company and the Union agree to amend paragraph 9 of the Company's Last and Best Proposal as hereafter set forth in this Memorandum of Agreement.

2. *WAGES* – I. Referring to Exhibit A which was presented to the Union on 12-22-77 and incorporated in the Company's Last and Best Proposal, the Company agrees to increase the rates of pay specified on said Exhibit A in the following amounts on the following dates:

(i) Effective on July 17, 1978, the Company agrees to increase the rates fifty cents (50¢) per hour;

(ii) On the first anniversary date of the agreement, namely July 17, 1979, the Company agrees to further increase the rates forty cents (40¢) per hour;

(iii) On the second anniversary date of the agreement, namely July 17, 1980, the Company agrees to further increase the rates sixty cents (60¢) per hour, which rate increase will extend to the expiration date of the contract, January 31, 1982.

II. Effective on July 17, 1978, the Company agrees to grant a one-time 25¢ per hour increase in the base rate of those employees classified as "Maintenance" and exclusive of the classifications of "Maintenance – Power Plant" and "Maintenance Helper."

3. In addition to the foregoing modifications of the Company's Last and Best Proposal, the Company and Union further agree as follows:

A. *Union Security* – The Company agrees to change its proposal from a maintenance of membership provision as submitted to the Union on 2-21-78 to a modified shop union security provision which was incorporated in the expired 1975-1978 contract.

B. *Overtime* – The Company will give the Union a letter of understanding setting forth that, when overtime

work is scheduled, the Company will endeavor to give employees as much notice as reasonably possible. This is to be a non-contractual commitment on the part of the Company and the application of this non-contractual commitment shall not be subject to the grievance and arbitration provisions of the contract.

C. *Vacations* – The Company agrees to reduce the vacation eligibility hours provided for in Article XXIII, Section 6(b) from 1500 to 1450. The Company further agrees to give the Union a letter of understanding stating that the Company will treat recalled former striking employees as new hires under Article XXIII, Section 3 for vacation pay computation purposes in accordance with the following procedure. In the event a recalled former striking employee has more than 12 but less than 24 months of continuous service on May 1, 1980 since the date of his recall, and otherwise qualifies for vacation pay under Article XXIII, Section 6(b), he shall be paid 2% of his entire gross earnings for the period from the time of his recall and return to work.

D. *Leadperson* – The Company agrees to red circle the base rate (not the incentive rate) of employees who were formerly in the now deleted working leadperson job classification.

E. *Recall of Former Striking Employees* – The Company agrees to offer reinstatement to former striking employees at the rate of 35 employees per month until such time as all former striking employees have been offered reinstatement. The Company and the Union agree that the Company may recall such employees into any available job which the recalled employee is qualified to perform, and that the Company is not required to follow strict order of seniority in the process of recalling these employees, but will make an earnest effort to do so. The Company and the Union further agree that, in the event it is necessary that the Company terminate replacement employees in order to comply with this recall schedule, such termination shall not be subject to the grievance and arbitration provisions of the contract.

F. *Pending Litigation* – The Company and the Union agree to dismiss all claims asserted in the damage suit ending in the Jefferson Circuit Court (Belknap, Inc. v. General Drivers, Warehousemen and Helpers, Local Union No. 89, et al., Jefferson Circuit Court, Division Thirteen, Civil Action No. 78C101745.).

G. The Company and the Union agree that employees Terry Decker and Fred Sowder shall not be reinstated in the employ of the Company because of their alleged misconduct; provided however, that the Company agrees to submit to artibration the issue whether or not the Company has cause to refuse to reinstate Terry Decker.

IN TESTIMONY WHEREOF, the Company and the Union, by their respective representatives hereunto duly authorized, have signed this Memorandum of Agreement as of the day, month and year first above written.

BELKNAP, INC.

By _____
Harold Fields
Director of Personnel

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89

By _____
Attorney

APPENDIX F

Supreme Court of Kentucky

NO. 81-SC-426-D

BELKNAP, INC., Petitioner,

v.

DUWAINE E. HALE, ET AL., Respondents.

ON PETITION FOR REVIEW OF THE DECISION
OF THE KENTUCKY COURT OF APPEALS

AMICUS CURIAE BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF PURPOSE

The question presented in this case is whether the National Labor Relations Act (hereinafter "the Act") preempts a state court suit for damages brought by strike replacements terminated by Belknap, Inc. (hereinafter "the Company") pursuant to a settlement agreement, approved by the National Labor Relations Board ("the Board"), and entered into between the employees' exclusive bargaining representative and the Company. The purpose of this brief is to demonstrate that the doctrine of preemption requires dismissal of the cause of action filed by respondents in the Jefferson Circuit Court.

STATEMENT OF POINTS AND AUTHORITIES

The National Labor Relations Act Preempts Respondents' Suit In State Court for Damages for Alleged Fraudulent Inducement

Linn v. United Plant Guard Workers,
383 U.S. 53 (1966) . . . . . .

National Labor Relations Act (29 U.S.C. Sec. 151, *et seq.*) .....
Motor Coach Employees v. Lockridge, 403 U.S. 274, 288-289 (1971) ...
San Diego Building Trades Council v. Garmon, 359 U.S. 236, 243 (1959).....
Lodge 76, Int'l Assn. of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission, 427 U.S. 132, 144-147 (1976).....
Garner v. Teamsters Union, 346 U.S. 485, 490-491 (1953).....

State Jurisdiction Over the Company's Offers of Employment to Strike Replacements Interferes With the Balance of Economic Weapons Contemplated By the National Labor Policy and Subjects to Regulations Conduct that Is "Arguably Prohibited" By the Act

Carpenters Union v. NLRB, 357 U.S. 93, 99-100 (1958).....
American Shipbuilding Co. v. NLRB, 380 U.S. 300, 316 (1965).....
NLRB v. Mackay Radio & Telephone Co., 304 U.S. 333, 345 (1938) ...
NLRB v. Erie Resistor, 373 U.S. 221, 233-235 (1963).....
NLRB v. International Rice Milling Co., 341 U.S. 665, 672-673 n. 8 (1951).....
NLRB v. Fleetwood Trailer Corp., 389 U.S. 375, 380-381 (1967).....
Laidlaw Corporation v. NLRB, 414 F.2d 99, 193 (7th Cir. 1969), cert. denied, 397 U.S. 920.....
Philip Carey Mfg. Co., Miami Cabinet Div. v. NLRB, 331 F.2d 720 (6th Cir. 1964), cert. denied, 397 U.S. 888.....

NLRB v. Johnson Sheet Metal, Inc., 442 F.2d 1056 (10th Cir. 1971) . .
Local 20, Teamsters v. Morton, 377 U.S. 252 (1964) . . . . . .
NLRB v. Insurance Agents, 361 U.S. 477 (1960) . . . . . .
NLRB v. Laredo Coca-Cola Bottling Co., 613 F.2d 1338 (5th Cir. (1980), cert. denied, U.S. , 101 S. Ct. 246 . . . . . .
Carpenters District Council of Jacksonville, 221 NLRB 876 (1975) . . . . .
Farmer v. Carpenters, 430 U.S. 290 (1977) . . . . . .
Steward, Conversation of Strikes Economic to Unfair Labor Practice, 45 Va. L.R. 1322 (1959) and 49 Va. L.R. 1297 (1963) . . . . . .
Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180 (1978) . . . . . .

State Jurisdiction Over the Company's Discharge of Strike Replacements Subjects to Regulation Conduct that Is, Depending on the Legal Character of the Strike, Either Required or "Arguably Prohibited" By the Act and Interferes With the National Labor Policy Encouraging Collective Bargaining

Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956) . . . . . .
Puritana Mfg. Corp., 159 NLRB 518 (1966) . . . . . .
NLRB v. Top Mfg. Co., Inc. 594 F.2d 223 (9th Cir. 1979) . . . . . .
Leveld Wholesale, Inc., 218 NLRB 1344 (1975) . . . . . .
C. H. Guenther & Son, Inc. d/b/a Pioneer Flour Mills, 174 NLRB 1202 (1969), enf'd 427 F.2d 983 (5th Cir. 1970), cert. denied, 400 U.S. 942 . . . . . .

Getlan Iron Works, Inc., 175 NLRB 864 (1967) .....
NLRB v. Allis-Chambers Mfg. Co., 388 U.S. 175 (1967) .....
Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975) .....
Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944).....
J. I. Case Co. v. NLRB, 321 U.S. 332 (1944).....
Retail Clerks Union Local 1364, Retail Clerks Int'l Assn., AFL-CIO, et al. (Food Employers' Council), 240 NLRB 1127 (1979).....
Stationary Engineers Local 39, Int'l Union of Operating Engineers, AFL-CIO (The San Jose Hospital and Health Care Center, Inc.), 240 NLRB 1122 (1979) .....
William E. Arnold Co. v. Carpenters, 417 U.S. 12 (1974).....
NLRB v. Strong, 393 U.S. 357 (1969) .
Carey v. Westinghouse Corp., 375 U.S. 261 (1964) .....
Food Employers' Council, 240 NLRB 1127 (1979) .....
Retail Clerks v. Lion Dry Goods, Inc., 369 U.S. 17 (1962).....
Vaca v. Sipes, 386 U.S. 171 (1967)....
The Wallace Corp. v. NLRB, 323 U.S. 248 (1944) .....

State Jurisdiction Over Respondents' Claims Will Discourage the Peaceful Settlement of Labor Disputes and Will Interfere With the Board's Administration of the Act

Hughes Tool Co. v. NLRB, 147 F.2d 69 (5th Cir. 1945).....
American National Insurance Co., 343 U.S. 395 (1952) .....

NLRB v. Jones & L.. ghlin Steel Corp., 301 U.S. 1, (1937) .....
Nash v. Florida Industrial Commission, 389 U.S. 235 (1967).....
Gulf States Manufacturers, Inc. v. NLRB, 598 F.2d 896 (5th Cir. 1979) (en banc).....

STATEMENT OF THE CASE

On October 10, 1974, the Union[1/] was certified by the Board as exclusive bargaining representative for the Company's warehouse and maintenance employees. The parties thereafter signed a collective bargaining agreement which, by its terms, expired on January 31, 1978.

Before the contract expired, the Union notified the Company of its intention to terminate the agreement and negotiate a new one. Negotiations began on December 15, 1977. By January 31, 1978, no agreement had been reached and the Union called a strike. Shortly thereafter, the Company granted a wage increase to unit employees, effective February 1, 1978, and began hiring replacements. Between February 1, July, 1978, the Union and the Company engaged in 15 additional negotiation sessions, assisted by representatives of the Federal Mediation and Conciliation Service. The parties were unable to resolve their differences, however, and the strike continued.

During the strike, a number of unfair labor practice charges were filed against both the Company and the Union. In addition, the Company filed an action against the Union in the Jefferson Circuit Court for an injunction and damages. Following an investigation, the Board's Regional Office issued a complaint alleging that the Company had unlawfully instituted the wage increase without notice to the Union, and further, that by virtue of such unlawful conduct the strike had been converted into an unfair labor practice strike. The Region also issued a complaint against the Union for alleged picket line violence.

1/ Teamsters' Local Union No. 89.

On July 17, 1978, representatives of the Company and the Union met with the Regional Director for the Ninth Region to discuss a settlement of the pending unfair labor practice cases. The Regional Director made it clear he would approve a withdrawal of the unfair labor practice charges if the parties reached an amicable strike settlement agreement. As a result of this settlement conference, the strike ended, the unfair labor practice complaints were withdrawn, the state court litigation was terminated and a new collective bargaining agreement was signed.

With regard to the striking employees, the parties agreed to a reinstatement schedule which provided that 35 strikers would be reinstated each month until such time as all striking would be employeed had been offered reinstatement. In order to fully implement this agreement, it was necessary for the Company to discharge some of the replacement employees. All of the discharged replacements were informed that they would be considered for reinstatement once the striking employees had been recalled.

Twelve terminated replacements filed the instant class action in the Jefferson Circuit Court for fraud, misrepresentation and breach of employment contract. Essentially, the complaint alleges that the members of the class were offered "permanent employment" and were thereby fraudulently induced to accept employment with the Company. Further, when the replacements were discharged pursuant to the strike settlement agreement, the Company allegedly breached its contractual obligations to members of the class. To remedy the effects of the Company's alleged wrongful acts, the plaintiffs are each seeking $250,000 compensatory damages and $250,000 punitive damages, as well as costs and any other just relief.

The circuit court granted the Company's motion for summary judgment on the ground that the state action was preempted by federal law. The court of appeals reversed, however, relying on *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966). The court concluded that the conduct alleged was merely a "peripheral concern" of the Board's and "greatly involves local feeling and responsibility that should be subject to the jurisdiction of the State courts" (slip op. at 5).

ARGUMENT

THE NATIONAL LABOR RELATIONS ACT PREEMPTS RESPONDENTS' SUIT IN STATE COURT FOR DAMAGES FOR ALLEGED FRAUDULENT INDUCEMENT AND BREACH OF CONTRACT ARISING OUT OF THE COMPANY'S EMPLOYMENT OF STRIKE REPLACEMENTS

A. Introduction and Applicable Principles

In enacting the National Labor Relations Act (29 U.S.C. Sec. 151, *et seq.)*, Congress intended that labor disputes affecting the free flow of interstate commerce would be regulated under a uniform federal law, which would be interpreted and applied by the Board. As the Supreme Court explained in *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 288-289 (1971):

> when it set down a federal labor policy Congress plaintly meant to do more than simply to alter the then prevailing substantive law. It sought as well to restructure fundamentally the processes for effectuating that policy, deliberately placing the responsibility for applying and developing this comprehensive legal system in the hands of an expert administrative body rather than the federalized judicial system [footnote omitted].

The preemption doctrine is designed to effectuate this Congressional intent by requiring state authority to yield to federal authority when it conflicts with the "complex federal scheme of law, remedy and administration" embodied by the Act. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959). Even if a state tribunal were to apply the federal labor law to a dispute before it, the potential for conflict with national labor policy is nonetheless great for:

> Congress in establishing overriding federal supervision of labor law "did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision . . . . Congress evidently considered that centralized administration of specially designed procedures was necessary

> to obtain uniform application of its substantive rules and to aboive these diversities and conflicts likely to result from a vairety of local procedures and attitudes toward labor controversies . . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible for conflicting adjudications as are different rule of substantive law."[2/]

Similarly, the fact that state law may afford an additional remedy for conflict with the national labor policy. "[S]ince remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy . . . which has been withheld from the [Board] only accentuates the danger of conflict," *Garmon*, 359 U.S. at 247.

These policy considerations, as well as the need for "a rule capable of easy application, so that lower courts may largely police themselves," (*Lockridge*, 403 U.S. at 290) led the Supreme Court to formulate its general rule of preemption in *Garmon*, 359 U.S. at 244, which was reaffirmed in *Lockridge*, 403 U.S. at 291, that:

> When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield.

In addition to the *Garmon-Lockridge* rule, the Supreme Court has formulated a second rule, that states are preempted from regulating conduct which, although neither protected nor prohibited by the Act, Congress intended to be "controlled by the free play of economic forces" and not regulated. *Lodge 76, Int'l Assn. of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 144-147, 155 (1976).

Both of these preemption rules apply to the instant case. We show below that because the respondents' causes of action involve conduct "plaintly within the central aim of federal regulation" (*Garmon*, 359 U.S. at 244), the court of appeals erred in concluding that the actions were not preempted.

B. State Jurisdiction O:er the Company's Offers of Employment to Strike Replacements Interferes With the Balance of Economic Weapons Contemplated By the National Labor Policy

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2/ Motor Coach Employees v. Lockridge, 403 U.S. at 287, quoting Garner v. Teamsters Union, 346 U.S. 485, 490-491 (1953).

and Subjects to Regulation Conduct that Is "Arguably Prohibited" By the Act

The Act is, to a large extent, "the result of conflict and compromise between strong contending forces and deeply held views on the . . . appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests," *Carpenters Union v. NLRB*, 357 U.S. 93, 99-100 (1958). Congress attempted to insure a rough balance of economic power between labor and management by conferring certain affirmative rights on employees–largely contained in Section 7–and by placing certain restrictions, which are set forth primarily in Section 8(a), on the activities of employers. "Having protected employee organization in countervailance to the employers' bargaining power, and having established a system of collective bargaining whereby the newly coequal adversaries might resolve their disputes, the Act also contemplated resort to economic weapons should more peaceful measures not avail." *American Shipbuilding Co. v. NLRB*, 380 U.S. 300, 316 (1965).

The right to strike is a fundamental "economic weapon" guaranteed to employees by the Act.[3/] During an economic strike (as opposed to an unfair labor practice strike),[4/] an

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3/ The employees' right to strike is expressly recognized in Section 13 of the Act, which provides: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike . . . . " See NLRB v. International Rice Milling Co., 341 U.S. 665, 672-673 and n. 8 (1951).

4/ An economic strike is one called to extract economic concessions. See, for example, NLRB v. Fleetwood Trailer Corp., 389 U.S. 375, 380-381 (1967); Laidlaw Corporation v. NLRB, 414 F .2d 99, 103 (7th Cir. 1969), cert. denied, 397 U.S. 920. An unfair labor practice strike is one called in response to an employer's violation of the Act. If, during an economic strike, an employer commits what the Board later determines to be an unfair labor practice and the union continues the strike beyond its natural duration to protest the practice, the strike is converted to an unfair labor practice strike. In such circumstances, the strikers become unfair labor practice strikers on the date of conversion and are entitled, upon an unconditional offer to return to work, to immediate reinstatement if they have not been permanently replaced before the strike's "conversion." Philip Carey Mfg. Co., Miami Cabinet Div. v. NLRB, 331 F .2d 720, 729 (6th Cir. 1964), cert. denied, 397 U.S. 888; NLRB v. Johnson Sheet Metal, Inc., 442 F .2d 1056, 1061 (10th Cir. 1971).

employer likewise has a potent economic weapon at his disposal–the right to hire temporary or permanent replacements in order to continue operating his business. *NLRB v. Mackay Radio & Telephone Co.*, 304 U.S. 333, 345 (1938). See also *NLRB v. Erie Resistor*, 373 U.S. 221, 233-235 (1963).

The Supreme Court has consistently stressed the importance of the freedom to utilize such economic weapons and the disruptive effect curtailment of that freedom would have on the collective bargaining process. *Local 20, Teamsters v. Morton*, 377 U.S. 252, 259-260 (1964); *Lodge 76, IAM*, 427 U.S. at 146; *NLRB v. Insurance Agents*, 361 U.S. 477, 489 (1960).[5/] The Court has emphasized that " '[r]esort to economic weapons should more peaceful measures not prohibit the use of such weapons or 'add to an employer's federal legal obligations in collective bargaining'," *Lodge 76, IAM*, 427 U.S. at 147. Any attempt by a state to regulate the employer's ability to employ replacements in order to defend against the economic pressure of a strike will have significant influence on the terms and conditions of employment negotiated by the parties. See *Lodge 76, IAM*, 427 U.S. at 144; *NLRB v. Insurance Agents*, 361 U.S. at 490.

The respondents' misrepresentation claim seeks to have the state regulate the Company's offer of permanent employment to the replacements. To permit the maintenance of such a claim will have the effect of discouraging other employers from using their prime economic weapon of replacing strikers when the legal character of the strike–that is, whether it is an unfair labor practice or an economic strike–is in doubt. Clearly, restraint on the employer's ability to hire replacements interferes with an economic self-help measure that is contemplated by the Act to be unfettered, and consequently upsets the balance between labor and management in collective bargaining. State interference with the delicately balanced ecnomic weapons of labor and management "frustrates the effective implementation" of the Act. *Lodge 76*, 427 U.S. at 148. For this reason, preemption of state jurisdiction over the misrepresentation claim is required.

5/ As pointed out by the Supreme Court in Garner, 346 U.S. at 400, "[f] or the state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purpose or by methods which the federal Act prohibits."

Moreover, the offer of permanent employment to strike replacements is arguably prohibited by Section 8(a)(1) of the Act if, as the General Counsel alleged, the strike was an unfair labor practice strike. *NLRB v. Laredo Coca Cola Bottling Co.*, 613 F.2d 1338, 1340-1341 (5th Cir. 1980), cert. denied, U.S. , 101 S. Ct. 246; *Carpenters District Council of Jacksonville*, 221 NLRB 876, 882-883, 889 (1975). Therefore, under the *Garmon* rule, because regulation of the Company's offer of "permanent" employment to strike replacements–the alleged fraudulent inducement–is within the exclusive jurisdiction of the Board, the exercise of jurisdiction by the State court is preempted.

Contrary to the view of the court of appeals, the facts presented here do not come within the exception to the preemption doctrine recognized by the Supreme Court in *Linn v. United Plant Guard Workers*, and again in *Farmer v. Carpenters*, 430 U.S. 290 (1977), for matters that are a "peripheral concern" of the Act, while involving an overriding state interest. As shown, the balance of economic weapons available to labor and management is the linchpin of national labor policy and, therefore, hardly a peripheral concern of the Act. In addition, unlike in the instant case, the Court found little risk in *Linn* and *Farmer* that the "state cause of action would interfere with the effective administration of national labor policy" (*Farmer v. Carpenters*, 430 U.S. at 298), because the state claim could be adjudicated without regard to the merits of the underlying labor controversy. Here, by contrast, in order to resolve the claim or misrepresentation the state court would have been presented to the Board had an 8(a)(1) charge been filed, namely, were the strikers engaged in an economic or unfair labor practice strike? If such a charge were filed, the Board would first have to determine the status of the strike, since the assurance of permanent employment to strike replacements during an *economic* strike, as shown previously, would not constitute an unfair labor practice. Similarly, in state court, the status of the strike would clearly have a strong bearing on whether the Company could have falsely represented a matter of law, as well as whether the strike replacements could reasonably have relied on the Company's offer. If the strike were economic, a factfinder would be less likely to find that a misrepresentation

had been made. On the other hand, if an unfair labor practice strike were involved, a claim of reasonable reliance on the Company's "inducement" would be subject to doubt.

The determination of the legal character of a strike involves a careful analysis of the cause, conduct and termination of the strike by its very nature involves the application of the Board's expertise. See generallly, Stewart, *Conversion of Strikes Economic to Unfair Labor Practice*, 45 Va. L.R. 1322 (1959) and 49 Va. L.R. 1297 (1963). To properly adjudicate the misrepresentation claim, the circuit court would have to decide this a very complex question of labor law. Since the resolution of this labor issue was entrusted to the Board by Congress, the exercise of State court jurisdiction "necesarily involves a risk of interference with the unfair labor practice jurisdiction of the Bord . . . . " *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 197 (1978). This is true even if the circuit court may purport to apply the Board's rules of substantive labor law, since, as the Supreme Court explained, Congress "deliberately plac[ed] the responsibility for applying and developing [the federal labor scheme] in the hands of an expert administrative body rather than the federalized judicial system." *Motor Coach Employees v. Lockridge*, 403 U.S. at 288-289. Accord: *Garmon*, 359 U.S. at 242-243; *Garner*, 346 U.S. at 490-491.

C. State Jurisdiction Over the Company's Discharge of Strike Replacements Subjects to Regualtion Conduct that Is, Depending on theLegal Character of the Strke, Either Required or "Arguably Prohibited. By the Act and Interferes With the National Labor Policy Encourageing Collective Bargaining

In suing for breach of contract, the respondents in essence seek to have the State determine the legality of their discharge./6

6/ The Supreme Court has stated that "it is the conduct being regulated, and not the formal description of governing legal standards, that is the proper focus of concern in determining whether state jurisdiction is preempted. "Lockridge, 403 U.S. at 292. "

There is no question in this case that the Company discharged the replacements in order to comply with the strike settlement agreement that it negotiated with the Union. It is clear, moreover, that if the strikers were engaged in an unfair labor practice strike, the Company was was required to offer them reinstatement to their former positions, discharging replacements if necessary. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956).

An employer's refusal to reinstate strikers pursuant to a strike settlement agreement violates Section 8(a) (1) of the Act. *Puritana Mfg. Corp.*, 159 NLRB 518, 533 (1966). In addition, an employer's failure to offer immediate reinstatement to unfair labor practice strikers after their unconditional offer to return to work contitutes a violation of Seciton 8 (a) (3) and (1) of the Act. See, for example, *NLRB v. Top Mfg., Inc., 594* F. 2d 223 225 (9th Cir. 1979). In these circumstances, where the federal labor laws require the discharge of strike replacements in the unfair labor practice strike contexr to accommodate the rights of returning strikers, the application of state law presents a strong potential for conflicting regulation of the same conduct and is, therefore, preempted. For "preemption," the Supreme Court has stated, "is designed to shield the system form conflicting regulation of conduct, "*Lockridge*, 403 U.S. at 292. Accord: *Garmon*, 359 U.S. At 244.

If, on the other hand, the strike was economic in character, them the Company's discharbe of the replacements is arguably prohibited by Seciton 8(a) (1) of the Act, for it is an unfair labor practice under that section for an employer to interfere with an employee's right, under Section 7, to retrain from assisting a labor organization./[7] The discharged replacements could

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7/ In this regard, the implication of the court of appeals that because the replacements were non-union, the enjoyed no remedies under the Act must be rejected. The juarnatees of Section 7 of the Act, which are effectuated by Section 8, are applicable to employees regardless of whether they belong to a union.

Furthermore, as we will show "infra", pp. 20-21, as members of the bargaining unit, the replacements are both bound by the results of the Union's bargaining owed a duty of fair representation by the Union.

have filed charges with the Board alleging that their discharges to make room for former economic strikers constituted such interference.

In adjudicating such an unfair labor practice charge, the Board would have to determine the legal character of the strike. Similary, in evaluating the Company's legal defenses to the breach of contract claim, the state court would have to make a determination of the same issue. As stated earlier, the potential for conflicting adjudication of this complex issue of labor law requires state authority to yield.

In addition, the circuit court's exercise of jurisdiction over the breach of contract claim would be contrary to public policy. First, as discussed above, the offer upon which the contract is based is agruably an unfair labor practice. Therefore, in order to determine the validity of the contract, the state court will be required to address an issue indentical to that which would have been before the Board had an 8 (a) (1) charge been filed – that is, the legality of the offer of "permanent" employment. Accordingly, under the rules promounced in *Garmon, Linn, Farmer & Sears, supra* the state action for breach of contract is preempted. Second, the breach of contract action based on individual contracts of employment flouts the national labor policy which favors collective bargaining. As members of the bargaining unit,/8 the replacements were bound by the collective bargaining agreement begotiated by the Union to end the strike, for Section 9(a) of the Act provides that the union "shall be the exlusive representative of all employees in the [the] unit for the purposes of collective bargaining in respect . . . conditions of employment." This policy "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen represen-

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8/ "Even after termination of a contract, a union represents all employees in the bargaining unit. That includes both strikers and strike replacements, "Leveld Wholesale, Inc., 218 NLRB 1344, 1350 (1975). See "C.H. Guenther & Son, Inc." d/b/a/ Pioneer Flour Mills, 174 NLRB 1202, 1203 (1969), enf'd 427 F.2d 983, 987 (5th Cir. 1970), cert. denied, 400 U.S. 942; Getlan Iron Workers, Inc., 175 NLRB 864, 867 (1967)."

tative to act in the interest of all employees." *NLRB v. Allis-Chambers Mfg. Co.*, 388 U.S. 175, 180 (1967). Accord: *Emporium Capwell Co. v. Western Addition Community Org.*, *420* U.S. 50, 63 (1975). See *Medo Photo Supply Corp. NLRB*, 321 U.S. 332, 335-339 (1944). This is because "[n] ational labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions,"*Allis-Chambers*, 388 U.S. at 1o0.

The law is clear that individual contracts:

> no matter what the circumstances that justify their execution or what their terms, may not be availed of the defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the bargaining unit. [9/]

Accordingly, the respondents' individual employment contracts were modified by the strike settlement aggrement signed by the union, acting as the representative of all unit employees strikers as well as strike replacements. See *Leveld Wholesale, Inc., 218* NLRB at 1350; *C.H. Guenther & Son*, 174 NLRB at 1203, 427 F. 2d 987; *Getlan Iron Works*, 175 NLRB at 867. With this modification, to strike replacements were clearly subject to discharge, and their termination was not a breach of any existing agreement.

9/ J. I. Case Co., 321 U.S. at 327.

Indeed, for the state to entertain this breach of contract claim subjects the strike settlement agreement to review – a result entirely at odds with Congress' intent, expressed in Section 1 of the Act, to both encourage and leave largely unregualted the "practice and prcedure of collective bargaining" as a means of achieving industrial peach and stability. The Board has interpreted this Congressional declaration as a directive to encourage adherence to the terms of collective bargaining agreements and strike settlement agreements. *Retail Clarks Union Local 1364, Retail Clarks Int'l Assn., AFL-CIO, et al. (Food Employers' Council),* 240 NLRB 1127, 1128-1129 (1979); *Stationary Engineers Local 39, Int'l. Union of Operating Engineers, AFL-CIO (the San Jose Hospital and Health Center, Inc.),* 240 NLRB 1122 1124 (1979). Cf. *William E. Arnold Co. v. Carpenters,* 417 U.S. 12, 1618 (1974); *NLRB v. Strong,* 393 U.S. 357, 360-361 (1969); *Carey v. Westinghouse Corp.,* 375, U.S. 261, 270-271 (1964). For, as the Board has observed, the breach of the provisions of a strike aettlement agreement "runs counter to a basic policy of Act to encourage the peaceful settlement of labor disputes through the practice and Porcedure of collective bargaining." *Food Employers' Council,* 240 NLRB 1127, 1128-1129 (1979); In holding that strike settlement agreements are enforceable under Section 301 of the Act. Supreme Court notec in *Retail Clerks v. Lion Dry Goods, Inc.,* 369 U.S. 17, 28, (1962) that unless these agreements could be enforced, "responsible and stable labor relations would suffer, and the attainment of the labor policy objective of monimizing disruption of interstate commerce would be made more difficult."

Any possible relief the circuit court may grant to the respondnets on this claim will interfere with and modity the adjustment of Company-employee rights expressed in the collectively-bargained strike settlement agreement. To aviod such obvious frustration of the Congressional intent not to interfere with settlement agreements, the respondents' claim must be preempt frustration of the Congressioanl intent not to interfere with settlement agreements, the respondents' claim must be preempted.

This does not mean that the replacemsnt are without a remedy under the Act. "Because the national labor policy vested unions

with power to order the relations of employees with their employer" (Allis-Chalmers, 388 U.S .it 181), the Supreme Court fashioned the duty of fair representation to stand "as a bulwark to prevent arbitrary union conduct against indivuduals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

Indischarging all of its representative functions, a union must represent the interests of all bargaining unit members farily and impartially. *The Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944); see also *Hughes Tool Co. v NLRB*, 147 F.2d 69 (5th Cir 1945). A breach of this duth of fair representation occurs "when a union's conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith," *Vaca v. Sipes*, 386 U.S. at 207. The breach of this duty is both a violation of Sectio 8(b) (1) (A) and (b) (2) of ht Act and of the federal common law. and is remdiable either before the Board or in state and federal courts. *Vaca v sipes*, 375 U.S. at 176-177.

The respondients clearly had hte right under the Act to have their interest fairly and nondiscriminatorily represented by the Union during the strike settlement negotiations. Since the respondents' discharges were the result of tje settlement begotiated by the Union, the proper avenues for testing the legality of their discharges are either by filing an 8(b) (1) (A) and (b) (2) charge before the Board or by filing a duty of fair represenation suit in state or federal district court. Therefore, the respondents under the national labor law.

D. State Jurisdiciton Over Respondents' Claims Will Discourage the Peaceful Settlement of Labor Disputes and Will Interfere With Board's Administration of the Act.

Application of state law to either of respondents. claims will threaten "interference with the clearly indicated policy of industrial relations" (*San Diego Bldg. Trades Coundil v. Garmon*, 389 U.S. at 243) since it will tend to discourage the peaceful settlement of labor disputes. As shown, "[t]he National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements governing

relations between unions and employers." *American National Insurance Co.*, 343 U.S. 395, 401-402 (1952). Accord: NLRB v. Jones & *Laughlin Steel Corp.*, 301 U.S. 1,45 (1937); *Vaca v. Sipes*, 386 U.S. at 182. Obviously, employers will be much less willing to settle a strike and pending unfair labor practice charges by agreeing to the reinstatement of strikers, if such action will expose the employer to substantial financial liability in a state court action. Instead, the employer will likely take the risk of litigating the unfair labor practice claims in hopes of convincing the Board that the strike was economic. If the employer prevails, there will be no requirement that strikers be reinstated immediately, and therefore no necessity of discharging the replacemtns – the action which creates the state cause of action. Accordingly, allowing the state action here "has a direct tendency to frustrate the purpose of Congress" in enacting the National Labor Relations Act. See *Nash v. Florida Industrial Commission*, 389 U.S. 235, 239, (1967).

Similarly, the exercise of state jurisdiction over respondents' claim will interfere with the Board's administration of the Act, by forcing the Board to devote more of its scant administrative resources to litigating, rather than settling, unfiar labor practice charges. This too presents the potential or interfering with national labor policy and is yet another reason why state action on respondents' claims is preempted. See *Gulf States Manufacturers, Inc. v NLRB*, 598 F.2d 896, 900-902 (5th Cir. 1979) (in Banc).

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should reverse the order of the court of appeals.

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October 1981

Joint Appendix

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 81-1966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BELKNAP, INC.

Petitioner,

v.

DUWAINE E. HALE, *et al.*

Respondents.

On Writ Of Certiorari To The Court Of Appeals Of The Commonwealth Of Kentucky

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PETITION FOR CERTIORARI FILED APRIL 24, 1982
CERTIORARI GRANTED JUNE 21, 1982

JOINT APPENDIX

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

December 12, 1978	Complaint filed in the Circuit Court of Jefferson County, Kentucky
February 25, 1980	Defendant's motion for summary judgment
May 8, 1980	Order by the Circuit Court granting Defendant's motion for summary judgment
May 28, 1980	Plaintiff's notice of appeal
August 29, 1980	Plaintiff's appeal to the Kentucky Court of Appeals
April 24, 1981	Decision of the Kentucky Court of Appeals
September 15, 1981	Order of the Supreme Court of Kentucky granting discretionary review
February 16, 1982	Order of the Supreme Court of Kentucky vacating the original order granting discretionary review

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-and-
PAUL LOGSDON
3806 Greenwich Road
Louisville, Kentucky

Plaintiffs

VS.

BELKNAP, INC.
P.O. Box 28
Louisville, Kentucky 40201
(Serve: Charles P. Brewer
111 East Main Street
Louisville, Kentucky 40202)

Defendants

COMPLAINT

* * *

The Plaintiffs herein, for their cause of action state as follows:

1. That the Plaintiffs herein and each of them are members of a class so numerous that joinder of all members is impracticable and there are questions of law or fact common to said class and under the provisions of KRS 23.01 and Sections thereafter, they are entitled to maintain a cause of action as representative parties on behalf of all members of said class, and that the claims of the representative parties are typical of the claims of the class and said representative parties will fairly and adequately protect the interest of said class.

2. That the Defendant, Belknap, Inc., is a corporation operating under the laws of the Commonwealth of Kentucky whose process agent is designated as Charles P. Brewer, 111 East Main Street, Louisville, Kentucky 40202.

3. That the individual Plaintiffs above, and the members of the class they purport represent are all former employees of the Defendant herein whose employment has been terminated or will be terminated during the pendency of this action under claims and circumstances as herein set out below.

4. That on or about February, 1978, the Defendant herein advertised by local newspaper advertising for permanent employees, a copy of said advertisement being attached hereto and marked Exhibit "A".

5. That following the solicitation as set out in the aforegoing paragraph, the Plaintiffs herein and all members of the class which they request to represent responded to the overtures set forth in said advertising and accepted permanent employment as employees of the Defendant herein.

6. That the terms of said employment were agreed upon by the Plaintiffs and members of the class and accepted by both the Plaintiffs and the class and the Defendant herein by documentation at the special insistence of Defendant specifically indicating the extent and duration of the employment and

the type and classification of the employment and the identification of the former employee which these Plaintiffs and class were replacing as indicated by one sample of such documentation dated February 22, 1978, signed by the employee and witnessed by a representative of the Defendant, a copy being attached hereto and made a part hereof.

7. That in consideration of the aforesaid agreements, the Plaintiffs herein and the said class members performed their duties to the satisfaction of the Defendant herein and complied in all respects with the Defendent company's requirements of performance, probationary tenure, and successfully passed employment evaluation, reviews as set forth in company policy, directives and custom and in all other respects acquired the status of permanent employees of the Defendant corporation.

8. That at some point in time, subsequent to the hiring of the Plaintiffs and members of the class and prior to the date of their individual terminations, the Defendant, Belknap, Inc., entered into a written contract with a third party by the terms of which contract the Defendant, Belknap, Inc., obligated itself to discharge all of the employees of Plaintiffs class so hired as set out above subsequent to the initiating of advertising for permanent employees as set out above.

9. That at a time beginning approximately August, 1978 and extending through the date of the filing of this action, the Defendant, Belknap, Inc., has embarked upon a systematic discharge of Plaintiffs and members of their class under terms and conditions more effectively described by a sample of such discharge notice dated September 29, 1978, a copy of which is attached hereto and marked Exhibit "C".

10. That the Defendant, Belknap, Inc., in the alternative, either never intended to hire permanent employees and made false representations in that regard as set out above knowing that those false representations would be acted upon by the Plaintiffs and members of the class and that such action would be to their detriment and that the Plaintiffs and the class would subsequently be injured thereby or in the alternative did enter into a contract for permanent employment of the Plaintiffs and their class and subsequently breached that agreement by a

deliberate act of entering into an irreversible agreement with the third party knowingly and willfully which obligated said Defendant, Belknap, Inc., to deliberately breached said contract and/or agreement with Plaintiffs and their class and thereby Plaintiffs and each of them and each member of said class was injured by reason of the destruction of an advantageous relationship to the extent of $200,000.00 each.

11. That in addition thereto, each Plaintiff and each member of the class so represented, has sustained additional damage by way of loss of life insurance benefits, hospitalization benefits, retirement benefits, and such other fringe benefits of their particular jobs as were available to them during employment all to their detriment in the sum of $50,000.00 each.

12. That the actions complained of on the part of the Defendant, Belknap, Inc., were of such a willful, wanton, intentional and malicious nature as to warrant the assessment of punitive damages to the extent of $250,000.00 each and to the class members as they may appear entitled.

WHEREFORE, Plaintiffs, demand judgment against the Defendant herein as follows:

1. A determination by the Court that this is a class action pursuant to Kentucky Rules of Civil Procedure 23, Class Actions.

2. Compensatory damages in the sum of $250,000.00 for each Plaintiff and each member of the class, said Plaintiffs may be allowed to represent pursuant to order of Court.

3. Punitive damages in the sum of $250,000.00 for each Plaintiff and each member of the class to which the Plaintiffs may be allowed by order of Court to represent.

4. Their costs herein expended and all further relief to which they may appear entitled, including a trial by jury on all issues so triable and a judgment for attorney fees to the extent that the Plaintiffs and class herein may appear entitled.

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JEFFERSON CIRCUIT COURT
Division Four (4)

No. 78CI 10337

DUWAINE E. HALE, *et al*
Plaintiff

vs.

BELKNAP, INC.
Defendant

MOTION FOR SUMMARY JUDGMENT

Comes the defendant Belknap, Inc., by counsel, and moves the Court pursuant to Rule 56 of the Kentucky Rules of Civil Procedure to grant said defendant summary judgment herein dismissing the complaint of plaintiffs Duwaine E. Hale, et al. on the ground that there is no genuine issue of law or fact and defendant, Belknap, Inc., is entitled to judgment as a matter of law.

In support of its motion herein, defendant Belknap, Inc., relies on the pleadings of record herein and the affidavit of Harold Fields, the Director of Personnel for defendant, Belknap, Inc.

Further in support of this motion, defendant Belknap, Inc., attaches hereto its memorandum of authorities.

Because of the importance of the issue raised in the defendant's motion for summary judgment, defendant respectfully moves the Court, pursuant to Rule 206 of the Rules of Practice of the Jefferson Circuit Court, to grant an oral argument on this motion at such time as may be convenient to the Court.

SMITH and SMITH

By _____
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By _____
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Attorneys for defendant, Belknap, Inc.

CERTIFICATE

I, Andrew J. Russell, Attorney for the Defendant, Belknap, Inc. hereby certify that a copy of the Motion for Summary Judgment was served upon the Plaintiffs by mailing copies thereof to Mr. Cecil Davenport, 425 South Fifth Street #100, Louisville, Kentucky 40202, Attorney for Plaintiffs, this 22nd day of February, 1980.

_____
Andrew J. Russell

JEFFERSON CIRCUIT COURT
Division Four (4)

No. 78CI 10337

DUWAINE E. HALE, *et al.*
Plaintiff

vs.

BELKNAP, INC.
Defendant

ORDER FOR SUMMARY JUDGMENT AND JUDGMENT

This cause having come on to be heard on motion of defendant Belknap, Inc. for summary judgment pursuant to Rule 56 of the Kentucky Rules of Civil Procedure, and the Court having considered all matters of record properly before the Court on said defendant's motion for summary judgment, and the Court having found that there is no genuine issue of fact to be submitted to the Court or a jury, and having concluded that said defendant is entitled to judgment as a matter of law, it is hereby

ORDERED, that said defendant's motion for a summary judgment is in all respect granted, and it is further

ORDERED, ADJUDGED AND DECREED, that this action be and the same is hereby dismissed, with prejudice, and that the defendant have and recover its costs from the plaintiffs.

Dated this 8th day of May, 1980.

Richard A. Revell
Judge
Jefferson Circuit Court

JEFFERSON CIRCUIT COURT
Division Four (4)

No. 78CI-10337

DUWAINE E. HALE, and
MICHAEL WINBURN, and
JOSEPH JOHNSON, III, and
MICHAEL SIMMONS, and
MARK BAGSHAW, and
JIM CARLISLE, and
CHRIS JONES, and
JOHN MARSHALL, and
EUGENE BELL, III, and
DAN J. STEMMLE, and
GEORGE BOGGS, and
PAUL LOGSDON
Plaintiffs/Appellants

VS.

NOTICE OF APPEAL

BELKNAP, INC.
Defendant/Appellee

* * *

Notice is hereby given that Duwaine E. Hale, Michael Winburn, Joseph Johnson, III, Michael Simmons, Mark Bagshaw, Bagshaw, Jim Carlisle, Chris Jones, John Marshall, Eugene Bell, III, Dan J. Stemmle, George Boggs, and Paul Logsdon, Plaintiffs in the above captioned action, hereby appeal to the Court of Appeals of Kentucky from the Summary Judgment entered in this action on May 8, 1980.

The Appellants are Duwaine E. Hale, Michael Winburn, Joseph Johnson, III, Michael Simmons, Mark Bagshaw, Jim Carlisle, Chris Jones, John Marshall, Eugene Bell, III, Dan J. Stemmle, George Boggs and Paul Logsdon. Appellants are represented by Cecil Davenport of HANISH, DAVENPORT, ROSENBERG & WEINER, Suite 200, Interchange Building, 835 West Jefferson Street, Louisville, Kentucky 40202, and Hollis L. Searcy of BOONE & LOWERY, 231 South Fifth Street, Louisville, Kentucky 40202.

The Appellee is Belknap, Inc. Appelle is represented by Andrew J. Russell and James U. Smith, 500 Marion E. Taylor Building, Louisville, Kentucky 40202.

HANISH, DAVENPORT,
ROSENBERG & WEINER

CECIL DAVENPORT
Attorney for Plaintiffs/Appellants
Suite 200, Interchange Building
835 West Jefferson Street
Louisville, Kentucky 40202
585-3225

HOLLIS L. SEARCY
BOONE & LOWERY
231 South Fifth Street
Louisville, Kentucky 40202
589-6060

It is hereby certified that a copy of the foregoing was mailed this 4th day of June, 1980, to Andrew J. Russell and James U. Smith, 500 Marion E. Taylor Building, Louisville, Kentucky 40202; and to George Logan, 430 South Fifth Street, Louisville, Kentucky 40202.

CECIL DAVENPORT

COURT OF APPEALS OF KENTUCKY

No. 78CI-10337

DUWAINE E. HALE; MICHAEL WINBURN; JOSEPH JOHNSON, III; MICHAEL SIMMONS; MARK BAGSHAW; JIM CARLISLE; CHRIS JONES; JOHN MARSHALL; EUGENE BELL, III; DAN J. STEMMLE; GEORGE BOGGS; and PAUL LOGSDON

Appellants

VS.

BELKNAP, INC.

Appellee

APPEAL FROM THE JEFFERSON CIRCUIT COURT
DIVISION FOUR
HONORABLE RICHARD A. REVELL, JUDGE

STATEMENT OF APPEAL

A. The name of the Appellants are: Duwaine E. Hale, Michael Winburn, Joseph Johnson, III, Michael Simmons, Mark Bagshaw, Jim Carlisle, Chris Jones, John Marshall, Eugene Bell, III, Dan J. Stemmle, George Boggs and Paul Longsdon. The name of the Appellee is: Belknap, Inc.

B. The names and addresses of counsel for appellants are:

Cecil Davenport
HANISH, DAVENPORT, ROSENBERG & WEINER
Suite 200, Interchange Building
835 West Jefferson Street
Louisville, Kentucky 40202

Hollis L. Searcy
BOONE & LOWERY
231 South Fifth Street
Louisville, Kentucky 40202

The names and addresses of counsel for Appellee are:

Andrew J. Russell
James U. Smith
500 Marion E. Taylor Bldg.
Louisville, Kentucky 40202

C. The name and address of the Trial Judge is:

Richard A. Revell
Fourth Division
Jefferson Circuit Court
Jefferson County Courthouse
Louisville, Kentucky 40202

D. The date the Summary Judgment was appealed from was entered is May 8, 1980.

E. The date the Notice of Appeal was filed was June 4, 1980.

HANISH, DAVENPORT, ROSENBERG, & WEINER

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COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

File No. 80-CA-1630-MR

DUWAINE E. HALE; MICHAEL WINBURN;
JOSEPH JOHNSON, III; MICHAEL SIMMONS;
MARK BAGSHAW; JIM CARLISLE;
CHRIS JONES; JOHN MARSHALL;
EUGENE BELL, III; DAN J. STEMMLE;
GEORGE BOGGS; and PAUL LOGSDON
Appellants

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE RICHARD A. REVELL, JUDGE
CIVIL ACTION NO. 78-CI-10337

BELKNAP, INC.
Appellee

REVERSING AND REMANDING

* * *

BEFORE: COOPER, GUDGEL, and VANCE, Judges. COOPER, Judge.

This is an appeal from a judgment for the appellee, defendant below, in an action for misrepresentation and beach of an employment contract. The issue is whether the trial court erred in determining that there existed no genuine issue as to any material fact and that the appellee was entitled to judgment as a matter of law. CR 56.03. On review, we reverse and remand.

The appellants, Duwaine E. Hale, Michael Winburn, Joseph Johnson, III; Michael Simmons; Mark Bagshaw; Jim Carlisle; Chris Jones; John Marshall; Eugene Bell, III; Dan J.

Stemmle; George Boggs; and Paul Logsdon, filed this action against the appellee, Belknap, Inc., in December of 1978. The action alleged fraud, misrepresentation, and breach of contract. The appellants were hired by the appellee as "permanent" replacement employees during a protracted strike by Local 89 of the Teamsters Union. The complaint alleged that the appellants were induced to accept employment in that this employment was characterized as permanent. Furthermore, the appellants alleged that the appellee breached the respective employment contracts by discharging the appellants and replacing them with the former striking employees subsequent to a settlement agreement entered into between the appellee and Local 89.

Thereafter, the appellee removed the action to the United States District Court for the Western District of Kentucky, asserting that Court's jurisdiction under the National Labor Relations Act, Title 29, U.S.C. § 158(d). That Court, in determining that the action was a common law action for tortious interference with an employment contract, determined that it had no concurrent original jurisdiction. Accordingly, it remanded the action to the trial court. The appellee subsequently filed a motion for summary of judgment, arguing that the substance of the appellants' claim was within the exclusive jurisdiction of the National Labor Relations Board. The trial court granted the appellee's motion and entered judgment for it. It is from this judgment that the appellants now appeal.

Under 29 U.S.C. § 158, the N.L.R.B. has exclusive jurisdiction over "unfair" labor practices. In granting judgment for the appellee, the trial court effectively determined that the claim filed against the appellee constituted an unfair labor practice thus was subject to the exclusive jurisdiction of the N.L.R.B. We disagree. Under § 158 (a), an unfair labor practice is defined to include interference with an employee's right to bargain collectively. Arguably, the appellant's claim involves an unfair labor practice as defined in 29 U.S.C. § 158(a)(3):

> (a) It shall be an unfair labor practice for an employer
>
> . . .

> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . .

Here, the actions allegedly engaged in by the appellee do not constitute an unfair labor practice as defined by subsection (a)(3) of 29 U.S.C. § 158. The appellants were non-union workers who sought full-time employment with the appellee, rather than membership in any particular labor organization. Furthermore, the alleged misrepresentation and breach of contract involved non-union individuals who were not parties to the collective bargaining agreement entered into between the appellee and Local 89.

In *Linn v. United Plant Guard Workers*, 383 U.S. 53, 15 L.Ed.2d 582, 86 S.Ct. 657 (1966) the Court was confronted with the question of preemption as it involved the jurisdiction of the federal courts under the N.L.R.A. and the jurisdiction of the state courts over matters involving state interest. There, the Court stated, in part, as follows:

> The court has dealt with specific preemption problems arising under the National Labor Relations Act on many occasions, going back as far as *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740, 86 L.Ed. 1154, 62 S.Ct. 820 (1942). However, in framing the preemption question before us we need look primarily to *San Diego Building Trades Council v. Garmon*, 350 9 U.S. 236, 3L.Ed.2d 775, 79 S.Ct. 773 (1959). . . In this respect, the Court concluded that States need not yield jurisdiction 'where activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . [or] where the regulated conduct touched interest so deeply rooted in local feeling and responsibility that, in absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.' *Id.* at 243-244; 3 L.Ed.2d at 781, p. 588.

In effect the Court stated that in spite of the strong bias in favor of federal preemption, situations existed whereby federal jurisdiction must give way to that of the state. Here such a situation exists. The appellants were hired by the appellee with the promise that they would be permanent employees. As a result of the bargaining agreement entered into between the striking employees and the appellee, the appellants were forcibly laid off. Clearly, such alleged action on the part of the appellee is a merely peripheral concern of the N.L.R.B. Conversely, the alleged behavior greatly involves local feeling and responsibility that should be subject to the jurisdiction of the state courts.

Without reaching the merits of the appellants' claim, we hold that the appellants are entitled to have their day in court. We quote with approval the language from *Jones v. General Tire and Rubber Co.*, 541 Fed.2d 665 (1976):

> Reduced to its basic elements, the plaintiff here is merely claiming a right of action based upon state and common law theories of breach of contract. Whether the plaintiff can establish this claim is not before us, and should not have been before the district court, because the claim in no manner hinges on a violation of a contract between the plaintiff's employer or its labor organization . . . [W]e are of the opinion that the plaintiff is entitled to have the determination of the merits of this case made in the forum originally selected by him.

The judgment of the trial court is reversed, with directions that it reassume jurisdiction of the action, and allow the action to proceed on its merits.

ALL CONCUR.

ATTORNEYS FOR APPELLANTS:

Cecil Davenport
Suite 200 Interchange Bldg.
835 W. Jefferson St.
Louisville, KY 40202

Hollis L. Searcy
231 S. Fifth St.
Louisville, KY 40202

ATTORNEYS FOR APPELLEE:

Andrew J. Russell
James U. Smith
500 Marion E. Taylor Building
Louisville, KY 40202

SUPREME COURT OF KENTUCKY

81-SC-426-D
(80-CA-1630-MR)

BELKNAP, INC.

Movant

VS.

JEFFERSON CIRCUIT COURT

78-CI-10337

DUWAINE E. HALE *et al.*

Respondents

ORDER GRANTING DISCRETIONARY REVIEW

The motion of Belknap, Inc., for a review of the decision of the Court of Appeals is granted.

The clerk of the Court of Appeals is directed to transfer to the clerk of the Supreme Court the entire record in this proceeding, File No. 80-CA-1630-MR.

ENTERED September 15, 1981.

Chief Justice

SUPREME COURT OF KENTUCKY

81-SC-426-DG

BELKNAP, INC.

Movant

ON REVIEW FROM COURT OF APPEALS

80-CA-1630-MR
(Jefferson Circuit Court No. 78-CI-10337)

VS.

DUWAINE E. HALE, *et al.*

Respondents

MEMORANDUM OPINION AND ORDER

The Court, having considered the briefs of movant and respondents and having heard oral argument in this matter, is of the opinion that discretionary review was improvidently granted.

This Court's order granting discretionary review is vacated and the case is remanded to the Court of Appeals for final disposition.

Palmore, C.J., Aker, Clayton, Stephens, Stephenson, and Sternberg, JJ., sitting. All concur.

ENTERED February 16, 1982.

Chief Justice

MEMORANDUM OF AGREEMENT

THIS MEMORANDUM OF AGREEMENT, made and entered into this 17th day of July, 1978 by and between

BELKNAP, INC., hereafter referred to as the "Company" and

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, hereafter referred to as the "Union,"

WITNESSETH:

WHEREAS, the Union is the collective bargaining representative of the Company's warehouse and maintenance employees at its facilities located at 111 East Main Street, Louisville, Kentucky, and

WHEREAS, the employees went out on a strike called against the Company by the Union on February 1, 1978 because of the failure of the Company and Union to reach agreement upon a collective bargaining agreement, and

WHEREAS, the Company and the Union have now reached agreement on a collective bargaining agreement and now desire to make a memorandum of the agreement reached between the parties,

NOW THEREFORE, the Company and the Union agree with each other as follows:

1. The Union agrees to the Company's Last and Best Proposal submitted to the Union on January 20, 1978 with the following changes, additions and modifications:

A. Paragraph 1B of the Company's Last and Best Proposal is amended so as to read as follows:

"Any employee who works a total of 7 hours (including overtime hours) on the last scheduled workday prior to and the first scheduled workday after a holiday (including the last scheduled workday prior to and the first scheduled workday after a period of

temporary layoff not to exceed 10 consecutive days as aforesaid) shall be considered to have worked the 'full' scheduled workday on each of those days."

B. The Company agrees to amend the proposal set forth in paragraph 2 of its Last and Best Proposal so as to change the word "minimum" in the new Section 4 of Article XI to read "maximum."

C. With regard to paragraph 6 of the Company's Last and Best Proposal, the Company and the Union have agreed that the contract shall become effective on July 17, 1978 and continue in full force and effect through midnight on January 31, 1982.

D. The Company and the Union agree to amend paragraph 9 of the Company's Last and Best Proposal as hereafter set forth in this Memorandum of Agreement.

2. WAGES—I. Referring to Exhibit A which was presented to the Union on 12-22-77 and incorporated in the Company's Last and Best Proposal, the Company agrees to increase the rates of pay specified on said Exhibit A in the following amounts on the following dates:

(i) Effective on July 17, 1978, the Company agrees to increase the rates fifty cents (50¢) per hour;

(ii) On the first anniversary date of the agreement, namely July 17, 1979, the Company agrees to further increase the rates forty cents (40¢) per hour;

(iii) On the second anniversary date of the agreement, namely July 17, 1980, the Company agrees to further increase the rates sixty (60¢) per hour, which rate increase will extend to the expiration date of the contract, January 31, 1982.

II. Effective on July 17, 1978, the Company agrees to grant a one-time 25¢ per hour increase in the base rate of those employees classified as "Maintenance" and exclusive of the classifications of "Maintenance—Power Plant" and "Maintenance Helper."

3. In addition to the foregoing modifications of the Company's Last and Best Proposal, the Company and Union further agree as follows:

A. Union Security—The Company agrees to change its proposal from a maintenance of membership provision as submitted to the Union on 2-21-78 to a modified shop union security provision which was incorporated in the expired 1975-1978 contract.

B. Overtime—The Company will give the Union a Letter of Understanding setting forth that, when overtime work is scheduled, the Company will endeavor to give employees as much notice as reasonably possible. This is to be a non-contractual commitment on the part of the Company and the application of this non-contractual commitment shall not be subject to the grievance and arbitration provisions of the contract.

C. Vacations—The Company agrees to reduce the vacation eligibility hours provided for in Article XXIII, Section 6(b) from 1500 to 1450. The Company further agrees to give the Union a Letter of Understanding stating that the Company will treat recalled former striking employees as new hires under Article XXIII, Section 3 for vacation pay computation purposes in accordance with the following procedure. In the event a recalled former striking employee has more than 12 but less than 24 months of continuous service on May 1, 1980 since the date of his recall, and otherwise qualifies for vacation pay under Article XXIII, Section 6(b), he shall be paid 2% of his entire gross earnings for the period from the time of his recall and return to work.

D. Leadperson—The Company agrees to red circle the base rate (not the incentive rate) of employees who were formerly in the now deleted working leadperson job classification.

E. Recall of Former Striking Employees—The Company agrees to offer reinstatement to former striking employees at the rate of 35 employees per month until such time as all former striking employees have been offered reinstatement. The Company and the Union agree that the Company may recall such employees into any available job which the recalled employee is qualified to perform, and that the Company is not required to follow strict order of seniority in the process of recalling these employees, but will make an earnest effort to do so. The Company and the Union further agree that, in the event it is necessary that the Company terminate replacement employees in order to comply with this recall schedule, such termination shall not be subject to the grievance and arbitration provisions of the contract.

F. Pending Litigation—The Company and the Union agree to dismiss all claims asserted in the damage suit pending in the Jefferson Circuit Court (Belknap, Inc., v. General Drivers, Warehousemen and Helpers, Local Union No. 89, et al., Jefferson Circuit Court, Division Thirteen, Civil Action No. 78C101745.).

G. The Company and the Union agree that employees Terry Decker and Fred Sowder shall not be reinstated in the employ of the Company because of their alleged misconduct; provided however, that the Company agrees to submit to arbitration the issue whether or not the Company has cause to refuse to reinstate Terry Decker.

IN TESTIMONY WHEREOF, the Company and the Union, by their respective representatives hereunto duly authorized, have signed this Memorandum of Agreement as of the day, month and year first above written.

BELKNAP, INC.

By _____
Harold Fields
Director of Personnel

GENERAL DRIVERS,
WAREHOUSEMEN AND
HELPERS, LOCAL UNION NO. 89

By _____
Ralph H. Logan
Attorney

Opposition

Office - Supreme Court, U.S.
FILED
MAY 21 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1966

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

BELKNAP, INC. - - - - - - Petitioner

versus

DUWAINE E. HALE;
MICHAEL WINBURN;
JOSEPH JOHNSON, III;
MICHAEL SIMMONS;
MARK BAGSHAW;
JIM CARLISLE;
CHRIS JONES;
JOHN MARSHALL;
EUGENE BELL, III;
DAN J. STEMMLE;
GEORGE BOGGS; and
PAUL LOGSDON - - - - - - Respondents

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KENTUCKY

HANISH, DAVENPORT, ROSENBERG & WEINER
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WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-1966

BELKNAP, INC. - - - - - *Petitioner*

v.

DUWAINE E. HALE;
MICHAEL WINBURN;
JOSEPH JOHNSON, III;
MICHAEL SIMMONS;
MARK BAGSHAW;
JIM CARLISLE;
CHRIS JONES;
JOHN MARSHALL;
EUGENE BELL, III;
DAN J. STEMMLE;
GEORGE BOGGS; and
PAUL LOGSDON - - - - - *Respondents*

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KENTUCKY

Duwaine E. Hale, et al., by and through their attorneys of record hereby respond to the Petition to this Court for a Writ of Certiorari to review the judgment of the Supreme Court of the State of Kentucky heretofore filed on behalf of Belknap, Inc., Petitioner.

QUESTION PRESENTED

Whether the courts of the State of Kentucky have the power to assume jurisdiction over the common law actions of fraud, misrepresentation and breach of contract, areas of social and economic concern over which the courts of the Commonwealth of Kentucky have exercised exclusive jurisdiction continuously since 1792.

STATEMENT OF THE CASE

On February 1, 1978, approximately 400 Belknap employees represented by Teamsters Local 89, hereinafter called "Union" went on strike. Almost immediately, the Petitioner, for reasons known only to it, decided to hire other employees. The records show that before any employees were hired and before advertising for employees took place, Belknap was aware of the very real possibility that the striking union workers would be returned to their positions creating a surplus of employees necessitating some decision to be made in that regard. Despite this admitted fact, the Petitioner proceeded to perpetrate an almost unbelievable fraud upon the Louisville area public generally and the Respondent workers here specifically, when it caused the following announcement to be published in the *Louisville Courier Journal & Times,* beginning February 5, 1978, and running daily through February 24, 1978;

"Permanent employees wanted
Belknap, Inc.
111 East Main Street
Louisville, Kentucky

OPENINGS AVAILABLE FOR QUALIFIED PERSONS LOOKING FOR EMPLOYMENT TO PERMANENTLY REPLACE STRIKING WAREHOUSE AND MAINTENANCE EMPLOYEES.

EXCELLENT EARNINGS, FRINGE BENEFITS AND WORKING CONDITIONS WITH STEADY YEAR-ROUND EMPLOYMENT.

MINIMUM STARTING RATE $4.55 PER HOUR. TOP RATE $5.85, DEPENDING ON SKILL, ABILITY AND EXPERIENCE, PLUS INCENTIVE EARNINGS OVER HOURLY RATE FOR MOST JOBS.

APPLY IN PERSON AT THE BELKNAP OFFICE LOCATED AT 111 EAST MAIN STREET BETWEEN 9:00 A.M. AND 2:30 P.M. MONDAY THROUGH FRIDAY. PARK IN COMPANY LOT AT 1st AND MAIN.

WE ARE AN EQUAL OPPORTUNITY EMPLOYER"

So alluring and deceiving was this advertisement that Harold Fields states in his deposition that a "tremendous" number of replacement applications was received shortly thereafter.

As each prospective non-union replacement was employed, Belknap made the following express indi-

vidual, written representation and promise to each and every replacement:

> "I, the undersigned, acknowledge and agree that I as of this date have been employed by Belknap, Inc. at its Louisville, Kentucky facility as a regular full time permanent replacement to permanently replace _____
> in the job classification of_____.
>
> _____
>
> (Replacement Employees' Signature)"

See Respondent's Interrogatory No. 12 and Belknap's answers. Thus, a part of each replacement worker's individual contract included this promise on the part of Belknap not to replace the replacement worker with a striking union worker. After the entire Belknap work force had been replaced, negotiation with the Union continued. On April 4, 1978, apparently in order to dissuade the concerns of the replacements, Belknap further practiced its deception when the following letter was published:

> "April 4, 1978
>
> *TO ALL PERMANENT REPLACEMENT EMPLOYEES*
>
> Our Company has been and still is experiencing very traumatic times. The first strike in our 137 year history began February 1, 1978, and continues still. At that time, we made the decision to hire permanent replacement employees so that we could continue to operate and serve our customers' needs. It was not an easy decision, but nevertheless a very necessary one.

We recognize that many of you continue to be concerned about your status as an employee. The Company's position on this matter has not changed nor do we expect it to change. You will continue to be permanent replacement employees so long as you conduct yourselves in accordance with the policies and practices that are in effect here at Belknap.

We have had a number of striking employees return to work. This is normal and in no way affects you or your job. They are simply filling vacancies that occur in the normal course of business.

There are many rumors and the vast majority of them are completely false. We ask your help in keeping false and misleading information to a minimum. Speak with your supervisor about any questions which you have. He will be glad to help you.

We continue to meet and negotiate in good faith with the Union. It is our hope and desire that a mutually acceptable agreement can be reached in the near future. However, we have made it clear to the Union that we have no intention of getting rid of the permanent replacement employees just in order to provide jobs for the replaced strikers if and when the Union calls off the strike.

Our overall productivity continues to increase and now is approaching normal in many areas. As you gain experience and familiarity with our total operation, we are confident there will be continued improvement.

Our customers have demonstrated great confidence in us by continuing to give us their business. We must do our very best in order to merit this confidence.

HAROLD FIELDS
Director of Personnel"

Unfortunately, the fears of the replacement employees were realized. On July 17, 1978, Belknap settled the strike with the Union and agreed to recall the "permanently replaced" strikers at the minimum rate of 35 per month. In fact, they were recalled in numbers greatly exceeding the minimum requirement and the entire recall of the striking work force was completed during the months of July, 1978 through January, 1979. (This fact is verifiable in the various statistical date provided by Belknap in its Answers to Plaintiff's Interrogatories).

Roughly two months after Belknap began recalling the strikers it also began "laying off" the non-union replacement workers of which the class herein is comprised. Interestingly enough, Belknap completed the "layoffs" of the majority of replacements during the seven month period beginning September, 1978, through March, 1979. This was within two months of the time frame of the recall of union workers. Belknap admits (again, see Harold Fields deposition) that the recall directly caused some of the layoffs. However, it contends that any replacement laid off after the recall of the Union was completed could not have been the result of the recall but rather due to a "slowdown" in business.

Those replacements "laid off" before all of the union workers had been recalled were notified of this fact by form letter providing no reason for the action. (See Exhibits to the Deposition of Harold Fields.) Those replacements laid off after the recall of the union workers received a second form letter prepared by Belknap. This form letter, written after this suit had been filed attempted to establish a "slowdown in business" as the reason for the layoff.

Appellants' suits were filed in the Jefferson Circuit Court in early December, 1978, naming Belknap as the only defendant. Three basic theories are advanced herein. First of all, it has been clearly alleged in the complaint that Belknap had committed callous and aggravated fraud and misrepresentation for which it is liable in tort. Both compensatory and punitive damages are sought.

Secondly, it is alleged that binding individual employment contracts were effected between each replacement and Belknap both orally and in writing, to the effect that each replacement would not lose his or her job status *on account of returning strikers.* Respondents do not merely contend that they were hired as "permanent" employees, for this would not provide them with any protection since generally such employees are terminable at the will of the company if not protected by a collective bargaining agreement. The key in this case is that while the replacements were not guaranteed that they would not be laid off for legitimate reasons such as a slow down in business,

they were specifically advised that they would not lose their jobs on account of returning strikers.

The third theory of recovery advanced by Respondents involves quasi-contract principles. Respondents allege that each and every replacement has relied to his or her detriment on Belknap's representation that his or her security would not be interrupted by returning strikers. Clearly, the replacements have changed their positions in that they have either left other employment to work at Belknap or they have lost valuable seniority time that could have been accruing at other employment but for the wasted time spent in reliance on Belknap's false promises. In addition, all of the replacement workers incurred countless episodes of actual, physical and emotional violence as they crossed the picket lines to work at Belknap under the assumption that their positions were secure, long-ranged employment.

Following the filing of this suit in December, 1978, the Petitioner attempted removal of this action to the United States District Court for the Western District of Kentucky. That court sustained the Respondents' motion to remand the action to the state court, concluding that the action was based in state law upon tort and contract theory and thus, there was no substantial federal question involved, with an opinion and order which is more fully set out in Appendix A. No appeal was taken by Belknap from this final order.

The Jefferson Circuit Court, upon assuming jurisdiction following the sustaining of the motion to remand by the United States District Court thereafter

sustained a motion for summary judgment and in doing so, did not make findings of fact or conclusions of law setting forth the basis of its granting the motion. The essence of granting a motion for summary judgment under the Rules of Civil Procedure of the Commonwealth of Kentucky merely concludes that taking into account the status of the record at that time in its most favorable light for the plaintiffs, there has not been presented a justiciable issue warranting submission to a jury or to the court setting at a bench trial. (Appendix B)

The decision granting summary judgment by the Jefferson Circuit Court was appealed to the Kentucky Court of Appeals. That court reversed, holding that the motion for summary judgment had been improperly sustained. The case was thus remanded to the trial court on April 24, 1981 (Appendix C).

The Petitioner disagreed with this ruling and sought discretionary review from the Supreme Court of Kentucky. Simultaneous with the filing of the request for discretionary review, the National Labor Relations Board sought permission to intervene as amicus curiae. After the National Labor Relations Board intervened as amicus curiae, the Supreme Court of Kentucky granted the request for discretionary review, oral arguments were heard, and the court decided that the Court of Appeals' decision was proper and disposed of the matter with an order stating that discretionary review had been improvidently granted.

Thus, we respond to the Petitioner's request for a Writ of Certiorari to review the actions heretofore spoken of.

REASONS FOR REFUSING TO GRANT THE WRIT

1. The granting of a Writ of Certiorari to review this action will most assuredly result in an opinion which will either restrict or modify the current body of federal law pronounced by this Court on the doctrine of pre-emption as it applies to interpretations of the National Labor Relations Act. The record in this case, inasmuch as it embodies only the granting and then the reversing of a motion for summary judgment is abbreviated in nature and devoid of the definitive proof as to constitute atypical case upon which one would hope such momentus pronouncements would be based. Only limited proof has been taken, the facts have not been clearly delineated and with the intervention of the National Labor Relations Board only at the highest state appellate level, there has been no opportunity at this stage to incorporate in the record the files of the National Labor Relations Board as it applies to the accepting or refusing jurisdiction, charges filed on behalf of the so-called replacement employees, et cetera. These matters are only referred to in briefs and by innuendo. Indeed, in determining, for instance, whether this is, as the Petitioners claim, state regulation of the employment rights of striker replacements, it would be important to have a record which contains the position the National Labor Rela-

tions Board Region 9 in Cincinnati, Ohio, took with regard to refusal to accept jurisdiction of complaints filed by the Respondents effected by this action. Such is not embodied in the record in this case since the going forward with the proof had only proceeded to the summary judgment level.

In short, it would appear that when pronouncements of law are to be made, they should be made on a record that is clear and concise and definitive of the proposition to be decided so that all who come thereafter would surely know of whence the court speaks.

2. That Petitioner fails in this case to understand the basic principles under which the Commonwealth of Kentucky undertakes to safe-guard its citizenry in this case. If the proof should show in this case that the Petitioner willfully and deliberately perpetrated a fraud upon the citizens of the Commonwealth of Kentucky using malicious and false advertisements and representations relied upon by innocent workers, then the application of the Federal Pre-emption Doctrine to this case would prohibit the Commonwealth of Kentucky from protecting its citizens by applying the common law rules of fraud, misrepresentation and contract and the imposition of punitive damages. A horrible injustice would result: the Respondents would be forced in the position of having been wronged with no adequate remedy at law. The National Labor Relations Board can award no damages, impose no penalty or give any adequate remedy to the defrauded individuals. The National Labor Relations Board cannot impose punitive damages as a deterrent to such

fraudulent action. The Board's lack of concern with individuals who gave up other advantageous positions in response to the fraudulent advertising and other misrepresenations, together with its inability to provide redress to the defrauded parties overrules the ordinary arguments for pre-emption.

3. The application of the case of *Linn* v. *United Plant Guard Workers,* 383 U. S. 53 (1966) is necessary and proper. The court in the *Linn* case determined that the preservation of State's rights set out in *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236 (1959) included the right of the states to exercise jurisdiction in cases found by the state to be of compelling interest.

The court in *Linn* stressed the fact that the principles expressed in *Garmon* were predicated on the consideration in part that the Board had already evaluated and dismissed the charges filed pursuant to the applicable provisions of the Act. A like situation existed here in that the defrauded Respondents had appealed to the National Labor Relations Board and the Board had refused to act, although this does not appear in the record of this case because of the entry of summary judgment at the trial level and it not having been an issue before the trial court. In the *Linn* case, it was noted that under the specific situation presented by the case, the Board was powerless to provide any means by which redress of the malicious libel could be sought. As in the *Linn* case, the Board would also be powerless here to award damages, impose a penalty, or give any other relief to the de-

frauded individuals, especially, it could not administer the principles of punitive damages as a deterrent to others who would attempt to defraud the citizenry of the Commonwealth of Kentucky.

4. The courts of the Commonwealth of Kentucky are in no wise attemping by the decision enunciated thus far to regulate either the hiring of replacement employees or the discharge of replacement employees or to alter, amend or affect in any way the terms of a collective bargaining agreement. The courts of the Commonwealth of Kentucky have merely indicated by their opinions that if the Petitioner had made fradulent representations to the Respondents on which the Respondents relied and acted to their detriment and if the Petitioner knew that they would be unable to fulfill those representations then the Respondents have stated a valid cause of action which the courts of the Commonwealth of Kentucky will entertain. The highest court of this Commonwealth has rightfully declared this case to be of compelling state interest that overrides the alleged conflict with federal labor law, which conflict existed only in the fertile imagination of the Petitioner.

We note with interest the failure of the National Labor Relations Board to participate in the petition to this court after having intervened before the Supreme Court of Kentucky. This demonstrates the same lack of concern over the fate of the Respondents and the wrongs of Belknap that prompted the NLRB to reject out of hand the Respondents' initial requests for assistance.

CONCLUSION

Based on the foregoing arguments and the authorities cited, the Respondents submit that the Petition for a Writ of Certiorari to the Supreme Court of the State of Kentucky should not be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

STEPHEN WERNERT, Individually and as Representative of a Class of Individuals - - - - - - - - *Plaintiff*

v. **No. C 79-0016-L(B)**

BELKNAP, INC. - - - - - - - - *Defendant*

AND

DUAINE E. HALE, Et Al. - - - - - *Plaintiffs*

v. **No. C 79-0013-L(B)**

BELKNAP, INC. - - - - - - - - *Defendant*

ORDER—Entered March 21, 1979

For the reasons set forth in the Memorandum filed this day,

IT IS ORDERED that these action be, and they hereby are, remanded to the Jefferson Circuit Court for further proceedings. It is further ORDERED that the Clerk is directed to send a certified copy of this Order to Paulie Miller, Clerk, Jefferson Circuit Court.

This 21st day of March, 1979.

(s) Thomas A. Ballantine, Jr.
United States District Judge

Copies to:

Counsel of record

MEMORANDUM—Entered March 21, 1979

This matter is before the Court on the motions of the plaintiffs to remand these actions to the Jefferson Circuit Court from which they were removed and on the motion of the defendant for summary judgment. In view of our decision on the motion to remand, we need not consider the motion for summary judgment.

These actions were commenced in the Jefferson Circuit Court by certain persons who were hired by defendant as "permanent" replacement employees during a protracted strike by Local 89 of the Teamsters Union. The gravamen of plaintiffs' complaints is that they were induced to accept employment at defendant's plant and that defendant thereafter tortiously breached its contract of employment with plaintiffs by discharging them and replacing them with former striking employees. The discharge and replacement of the plaintiffs was a part of the settlement agreement between defendant and Local 89.

Defendant removed the actions to the United States District Court for the Western District of Kentucky, asserting the Court's jurisdiction under the National Labor Relations Act and, specifically, Title 29, United States Code, Section 158(d).

At the outset, we point out that there is a duty resting on this Court to notice and determine the existence of a federal question. This is true even if the motion to remand is not made. *Jones* v. *General Tire & Rubber Co.*, 541 F. 2d 660 (7th Cir. 1976). The burden is on the party seeking to preserve the removal to show that the requirements for removal have been met. *See 14 Wright, Miller & Cooper, Federal Practice and Procedure,* Section 3739 at page 758. When the defect in removal does not go to the jurisdiction of the Court it may be waived as when there is concurrent original jurisdiction. *Stokes* v. *Merrill Lynch, Pierce,*

Fenner & Smith, 523 F. 2d 433 (6th Cir. 1975). Remand may be ordered only when the removal is improvident and the court lacks jurisdiction. *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U. S. 336, 96 S. Ct. 584 (1976).

Title 29 U.S.C. Section 158(d), under which this Court's jurisdiction is invoked, deals with the obligation of parties to bargain collectively. Were this a dispute between defendant and Local 89, that statute would have some efficacy. It is not such a dispute. The action is a common law action for tortious interference with an alleged contract between defendant and certain individuals who were not parties to the collective bargaining agreement between defendant and Local 89. This Court has no concurrent original jurisdiction of the dispute since no diversity exists.

We believe the following language from *Jones* v. *General Tire & Rubber Co., supra*, has particular application here:

> "Removal is proper where the real nature of the claim asserted in the complaint is federal, whether or not so characterized by the plaintiff. *Beacon Moving & Storage, Inc.* v. *Local 814, International Brotherhood of Teamsters*, 362 F. Supp. 442, 445 (S.D.N.Y. 1972). Nonetheless, the plaintiff has the prerogative of determining the theory of his action and, so long as fraud is not involved, he may defeat removal to the federal courts by avoiding allegations which provide a basis for the assertion of federal jurisdiction. *J. Landowne Co.* v. *Paper Box Makers and Paper Specialties Union, Local 299*, 278 F. Supp. 339, 340 (E.D.N.Y. 1967).
>
> There was no basis upon which the district court could conclude that the plaintiff was employing artful manipulation of the terms of the complaint in order to defeat removal. *Cf. Hearst Corp.* v. *Shopping Center Network, Inc.*, 307 F. Supp. 551, 556 (S.D.N.Y. 1969).

Because the plaintiff's complaint omitted important allegations and did not purport to ground a claim on § 301(a), the defendant bore the burden of establishing the jurisdiction of the district court. It is well established that the burden is on the party seeking to remove to establish his right and the case should be remanded if there is doubt as to the right of removal in the first instance." 541 F. 2d at 664.

"Reduced to its basic elements, the plaintiff here is merely claiming a right of action based upon state and common law theories of breach of contract. Whether the plaintiff can establish this claim is not before us, and should not have been before the district court, because the claim in no manner hinged upon a violation of a contract between the plaintiff's employer or its labor organization. While we are not pleased with the prospect of sending a claim of dubious merits back for further litigation, we are of the opinion that the plaintiff is entitled to have the determination of the merits of his case made in the forum originally selected by him. The defendant is deprived of no valuable right, for as Judge Hutchinson observed in remanding a case, as he understood the jurisprudence of the state in which he was sitting, it 'operates with an eye to justice, just the same as that of the federal court.' *Pabst* v. *Roxanna Petroleum Co.*, 30 F. 2d 953, 954 (S.D. Tex. 1929)." 541 F. 2d at 665.

The similarity of the factual situation in these cases to that in *Jones* compels the Court to observe that the Jefferson Circuit Court operates with the same eye to justice as we do.

Plaintiffs' motions to remand will be granted and the Clerk will be directed to mail a certified copy of the order

of remand to Paulie Miller, Clerk of the Jefferson Circuit Court. 28 U.S.C. Section 1447(c).

An appropriate Order has been entered this 21st day of March, 1979.

(s) Thomas A. Ballantine, Jr.
United States District Judge

Copies to:

Counsel of record

APPENDIX B

JEFFERSON CIRCUIT COURT

DIVISION FOUR (4)

No. 78 CI 10337

DUWAINE E. HALE, Et Al. - - - - *Plaintiff*

v.

BELKNAP, INC. - - - - - - *Defendant*

ORDER FOR SUMMARY JUDGMENT AND JUDGMENT
—Entered May 8, 1980

This cause having come on to be heard on motion of defendant Belknap, Inc. for summary judgment pursuant to Rule 56 of the Kentucky Rules of Civil Procedure, and the Court having considered all matters of record properly before the Court on said defendant's motion for summary judgment, and the Court having found that there is no genuine issue of fact to be submitted to the Court or a jury, and having concluded that said defendant is entitled to judgment as a matter of law, it is hereby

ORDERED, that said defendant's motion for a summary judgment is in all respect granted, and it is further

ORDERED, ADJUDGED AND DECREED, that this action be and the same is hereby dismissed, with prejudice, and that the defendant have and recover its costs from the plaintiffs.

Dated this 8th day of May, 1980.

(s) Richard A. Revell, Judge
Jefferson Circuit Court

APPENDIX C

OPINION RENDERED: APRIL 24, 1981; 10:00 A.M.
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

File No. 80-CA-1630-MR

DUWAINE E. HALE;
MICHAEL WINBURN;
JOSEPH JOHNSON, III;
MICHAEL SIMMONS;
MARK BAGSHAW;
JIM CARLISLE;
CHRIS JONES;
JOHN MARSHALL;
EUGENE BELL, III;
DAN J. STEMMLE;
GEORGE BOGGS; and
PAUL LOGSDON - - - - - - - *Appellants*

v.

BELKNAP, INC. - - - - - - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable Richard A. Revell, Judge
Civil Action No. 78-CI-10337

REVERSING AND REMANDING

BEFORE: COOPER, GUDGEL, and VANCE, Judges.

COOPER, Judge. This is an appeal from a judgment for the appellee, defendant below, in an action for misrepresentation and breach of an employment contract. The issue is whether the trial court erred in determining that there

existed no genuine issue as to any material fact and that the appellee was entitled to judgment as a matter of law. CR 56.03. On review, we reverse and remand.

The appellants, Duwaine E. Hale, Michael Winburn, Joseph Johnson, III; Michael Simmons; Mark Bagshaw; Jim Carlisle; Chris Jones; John Marshall; Eugene Bell, III; Dan J. Stemmle; George Boggs; and Paul Logsdon, filed this action against the appellee, Belknap, Inc., in December of 1978. The action alleged fraud, misrepresentation, and breach of contract. The appellants were hired by the appellee as "permanent" replacement employees during a protracted strike by Local 89 of the Teamsters Union. The complaint alleged that the appellants were induced to accept employment in that this employment was characterized as permanent. Furthermore, the appellants alleged that the appellee breached the respective employment contracts by discharging the appellants and replacing them with the former striking employees subsequent to a settlement agreement entered into between the appellee and Local 89.

Thereafter, the appellee removed the action to the United States District Court for the Western District of Kentucky, asserting that Court's jurisdiction under the National Labor Relations Act, Title 29, U.S.C. §158(d). That Court, in determining that the action was a common law action for tortious interference with an employment contract, determined that it had no concurrent original jurisdiction. Accordingly, it remanded the action to the trial court. The appellee subsequently filed a motion for summary judgment, arguing that the substance of the appellants' claim was within the exclusive jurisdiction of the National Labor Relations Board. The trial court granted the appellee's motion and entered judgment for it. It is from this judgment that the appellants now appeal.

Under 29 U.S.C. §158, the N.L.R.B. has exclusive jurisdiction over "unfair" labor practices. In granting judgment for the appellee, the trial court effectively determined that the claim filed against the appellee constituted an unfair labor practice and thus was subject to the exclusive jurisdiction of the N.L.R.B. We disagree. Under §158(a), an unfair labor practice is defined to include interference with an employee's right to bargain collectively. Arguably, the appellant's claim involves an unfair labor practice as defined in 29 U.S.C. §158(a)(3):

> (a) It shall be an unfair labor practice for an employer . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

Here, the actions allegedly engaged in by the appellee do not constitute an unfair labor practice as defined by subsection (a)(3) of 29 U.S.C. §158. The appellants were non-union workers who sought full-time employment with the appellee, rather than membership in any particular labor organization. Furthermore, the alleged misrepresentation and breach of contract involved non-union individuals who were not parties to the collective bargaining agreement entered into between the appellee and Local 89.

In *Linn* v. *United Plant Guard Workers,* 383 U. S. 53, 15 L. Ed. 2d 582, 86 S. Ct. 657 (1966), the Court was confronted with the question of preemption as it involved the jurisdiction of the federal courts under the N.L.R.A. and the jurisdiction of the state courts over matters involving state interest. There, the Court stated, in part, as follows:

> The court has dealt with specific preemption problems arising under the National Labor Relations Act on

> many occasions, going back as far as *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 86 L. Ed. 1154, 62 S. Ct. 820 (1942). However, in framing the preemption question before us we need look primarily to *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959) . . . In this respect, the Court concluded that States need not yield jurisdiction 'where activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . [or] where the regulated conduct touched interest so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.' *Id.* at 243-244; 3 L. Ed. 2d at 781, p. 588.

In effect, the Court stated that in spite of the strong bias in favor of federal preemption, situations existed whereby federal jurisdiction must give way to that of the state. Here, such a situation exists. The appellants were hired by the appellee with the promise that they would be permanent employees. As a result of the bargaining agreement entered into between the striking employees and the appellee, the appellants were forcibly laid off. Clearly, such alleged action on the part of the appellee is a merely peripheral concern of the N.L.R.B. Conversely, the alleged behavior greatly involves local feeling and responsibility that should be subject to the jurisdiction of the state courts.

Without reaching the merits of the appellants' claim, we hold that the appellants are entitled to have their day in court. We quote with approval the language from *Jones* v. *General Tire and Rubber Co.*, 541 Fed. 2d 665 (1976):

> Reduced to its basic elements, the plaintiff here is merely claiming a right of action based upon state and common law theories of breach of contract. Whether the plaintiff can establish this claim is not before us, and should not have been before the district court, because the claim in no manner hinges on a violation of a contract between the plaintiff's employer or its labor organization . . . [W]e are of the opinion that the plaintiff is entitled to have the determination of the merits of this case made in the form originally selected by him.

The judgment of the trial court is reversed, with directions that it reassume jurisdiction of the action, and allow the action to proceed on its merits.

ALL CONCUR.

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Amicus Brief

Office - Supreme Court, U.S.
FILED
MAY 24 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1966

In the Supreme Court of the United States

OCTOBER TERM, 1981

BELKNAP, INC., PETITIONER

v.

DUWAINE E. HALE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1966

BELKNAP, INC., PETITIONER

v.

DUWAINE E. HALE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY [1]

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE IN SUPPORT OF THE PETITION

INTEREST OF THE NATIONAL LABOR RELATIONS BOARD

The question presented in this case is whether the National Labor Relations Act (NLRA) preempts a

[1] The petition seeks a writ of certiorari to the Supreme Court of Kentucky. However, that court did not rule on the merits of this case (Pet. App. D 1). It initially granted discretionary review of the decision of the Kentucky Court of Appeals, but later vacated its previous order and stated that review had been improvidently granted. Thus, the only judgment that may properly be reviewed is that of the Kentucky Court of Appeals. The 90-day period for seeking review of that judgment began on February 16, 1982, when the Supreme Court of Kentucky vacated its order granting discretionary review. *American Railway Express Co.* v. *Levee*, 263 U.S. 19, 20-21 (1923). The petition was filed on April 24, 1982, and was therefore within the time limit prescribed by 28 U.S.C. 2101(c).

state court suit for damages brought against an employer subject to the NLRA by individuals who were hired to replace striking employees and later terminated pursuant to a strike settlement agreement approved by the National Labor Relations Board and entered into by the employer and its employees' union representative. The National Labor Relations Board believes that to permit such state court suits would interfere with the regulatory scheme contained in the NLRA and would undermine the Act's objective of encouraging the peaceful settlement of labor disputes. The Board therefore has a significant interest in the proper application to this case of the doctrine of preemption, which is designed to preclude such state interference with the uniform administration of federal law.

STATEMENT

1. In 1974, Teamsters Local Union No. 89 ("the Union") was certified by the National Labor Relations Board ("the Board") as the exclusive bargaining representative for the warehouse and maintenance employees of Belknap, Inc. ("the Company"). The Company and the Union then signed a collective bargaining agreement. The contract expired on January 31, 1978, before an agreement on a new contract was reached, and on February 1, 1978, the Union called a strike in which 400 employees participated. The Company granted a wage increase, effective February 1, 1978, to unit employees who stayed on the job. It also advertised for and later hired "permanent" replacements for its striking employees (Pet. 3).[2]

---

[2] A copy of the newspaper advertisement (see Pet. App. A 3) is set forth in the Appendix hereto, *infra*, page 1a.

During the strike, a number of unfair labor practice charges were filed against the Company and the Union. The Company also filed a state court action against the Union seeking both injunctive and compensatory relief. Following an investigation, the Board's Regional Director issued a complaint alleging that the Company unlawfully instituted the February 1 wage increase without notice to the Union. The General Counsel also issued a complaint against the Union for alleged picket line violence (Pet. 3).

In July 1978, representatives of the Company and the Union met with the Board's Regional Director to discuss the settlement of the pending unfair labor practice complaints. The Director indicated that he would approve the withdrawal of the unfair labor practice charges if the Company and the Union reached an amicable strike settlement agreement. As a result of this conference, the parties entered into an agreement that ended the strike, terminated the state court litigation, specified the terms of a new contract, and provided that 35 strikers would be reinstated each month until all the strikers had been offered reinstatement (Pet. App. E). The Regional Director then approved the withdrawal of the unfair labor practice charges (Pet. 3-4).

2. In order to reinstate the strikers in accordance with the strike settlement agreement, the Company terminated some of the strike replacements. However, the discharged strike replacements were informed that they would be considered for reemployment once all the striking employees had been recalled (Pet. 4).

Respondents, twelve of the laid-off strike replacements, then filed a class action against the Company in state court in Kentucky for fraud, misrepresentation, and breach of contract. Seeking to represent

a class consisting of all the discharged strike replacements, respondents alleged that the Company had induced members of the class to enter into employment contracts by offering them "permanent employment" even though the Company never intended to hire permanent replacements. They also claimed that the Company had breached its employment contracts with them by entering into a strike settlement agreement that required reinstatement of the strikers. Each member of the class sought $500,000 in compensatory and punitive damages (Pet. App. A).

The trial court granted the Company's motion for summary judgment on the ground that the action was preempted by federal labor law (Pet. App. B). However, the Kentucky Court of Appeals reversed, concluding that the action was not preempted for two reasons. First, the court stated that respondents' complaint did not allege conduct constituting an unfair labor practice. The court observed that petitioner's alleged conduct did not violate Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), which prohibits "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." The court reasoned that respondents "were non-union workers who sought full-time employment with [the Company], rather than membership in any particular labor organization" (Pet. App. C 3). Second, the court concluded that in this case, as in *Linn* v. *United Plant Guard Workers*, 383 U.S. 53 (1966), the conduct at issue was "a merely peripheral concern" of the Board and "greatly involve[d] local feeling and responsibility that should be subject to the jurisdiction of the state courts." The Court of Appeals directed the trial court to "reassume

jurisdiction of the action, and allow the action to proceed on its merits" (Pet. App. C).

3. The Supreme Court of Kentucky initially agreed to review the decision of the Court of Appeals, and the Board was granted leave to file a brief as *amicus curiae*.[3] However, the Kentucky Supreme Court later vacated its grant of discretionary review and remanded the case to the Court of Appeals for final disposition. (Pet. App. D).

REASONS FOR GRANTING THE WRIT

The decision of the Kentucky Court of Appeals conflicts squarely with the established rules governing federal preemption of matters in the field of labor law. This Court has held (*San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244 (1959)) that

> [w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield.

See also *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 288-289 (1971). In addition, states are preempted from regulating conduct intended by Congress " 'to be controlled by the free play of economic forces' " (*Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132, 140 (1976)). Both these preemption rules apply in the instant case but were ignored by the court below. Not only does respondents' suit concern conduct that may constitute an unfair labor practice, but recognition of the cause of action asserted in respondents' complaint would

[3] The Board's brief is reproduced in Pet. App. F.

alter significantly the balance of economic weapons contemplated by the national labor policy. Furthermore, the decision below, if permitted to stand, will frustrate the intent of the NLRA by discouraging the peaceful settlement of labor disputes. For all these reasons, review by this Court is warranted.

1. Federal labor law seeks to ensure a rough balance of economic power between labor and management. The right to strike is the fundamental economic weapon guaranteed to employees by Sections 7 and 13 of the NLRA, 29 U.S.C. 157 and 163. *NLRB* v. *International Rice Milling Co.*, 341 U.S. 665, 672-673 & n.8 (1951). As a counter to this weapon, employers may hire permanent replacements for the strikers if the strike is an "economic strike" but may not do so if the strike is an "unfair labor practice strike."[4] *NLRB* v. *Mackay Radio & Telegraph Co.*,

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[4] An economic strike is one called to extract economic concessions. See, *e.g.*, *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 380-381 (1967); *Laidlaw Corporation* v. *NLRB*, 414 F.2d 99, 103 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970). An unfair labor practice strike is one called in response to an employer's violation of the NLRA. If, during an economic strike, an employer commits what the Board later determines to be an unfair labor practice and the union continues the strike beyond its natural duration to protest that practice, the strike is converted into an unfair labor practice strike. In such circumstances, the strikers become unfair labor practice strikers on the date of the conversion, and when an unconditional offer to return to work is made, they are entitled to immediate reinstatement if they had not been permanently replaced before the strike's "conversion." *Philip Carey Mfg. Co., Miami Cabinet Div.* v. *NLRB*, 331 F.2d 720, 729 (6th Cir.), cert. denied, 379 U.S. 888 (1964); *NLRB* v. *Johnson Sheet Metal, Inc.*, 442 F.2d 1056, 1061 (10th Cir. 1971). See Stewart, *Conversion of Strikes Economic to Unfair Labor Practice*, 45 Va.L.Rev. 1322 (1959); 49 Va.L.Rev. 1297 (1963).

304 U.S. 333, 345 (1938). Respondents' misrepresentation claim would disturb the balance of economic power by seeking to have the state regulate the Company's offer of permanent employment to the replacements. Respondents' misrepresentation claim is accordingly preempted by federal law, which leaves employers free of the fetters respondents would impose. See *Machinists* v. *Wisconsin Employment Relations Commission*, *supra*, 427 U.S. at 140.

As noted, employers may hire permanent replacements during an economic strike but not during an unfair labor practice strike. Whether a particular strike is an economic strike or an unfair labor practice strike is not always clear and often cannot be determined until after the strike has ended (see note 4, *supra*). Thus, if an employer's right to hire permanent replacements is to have the full intended effect, the employer must be free to offer permanent employment to the replacements in the large percentage of cases in which the nature of the strike is not entirely free from doubt. In such cases, of course, it may ultimately be found that the strike was caused or prolonged by unfair labor practices and that the strikers are consequently entitled to displace the replacements. Moreover, even in the case of economic strikes, strike settlement agreements frequently provide, as did the agreement here, for the reinstatement of the strikers, thereby causing some or all of the replacements to be laid-off. Under the NLRA, however, strike replacements who are offered permanent employment must assume the risk that they may later be displaced by returning strikers, either because the strike has been found to have been caused or prolonged by unfair labor practices on the part of the employer or because of a settlement agreement negotiated with the union representing the employees

in the bargaining unit. If replacements terminated for these reasons may sue the employer for damages on the theory that its offer of permanent employment was fraudulent,[5] an additional burden will be placed upon the right of employers to hire replacements, and the balance of economic power will be altered. Moreover, in order for a state court to determine whether the employer's offer of permanent employment was fraudulent or a misrepresentation, it would be necessary for the court to determine whether the strike was an economic strike or an unfair labor practice strike. This is the very issue that the Board must decide, when, as in this case, unfair labor practice charges are lodged by the strikers. On a complex issue of this nature, a state court and the Board may well reach conflicting results. As this Court has observed, however, "[p]re-emption * * * is designed to shield the system from conflicting regulation of conduct" (*Motor Coach Employees* v. *Lockridge*, *supra*, 403 U.S. at 292).

2. The replacements' claim for breach of contract stands on no firmer footing. In essence, respondents seek to have the state court determine the legality of their discharge. However, the Company discharged the replacements in order to comply with the strike settlement agreement negotiated with the Union. Section 9(a) of the NLRA, 29 U.S.C. 159

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[5] The basis for the fraud charge here is merely that when the Company advertised for permanent replacements it was aware that "if the strike were converted from an economic strike to an unfair labor practice, * * * the National Labor Relations Board could order us to fire all replacement employees immediately and bring back all striking employees" and that there was a "*possibility* that by agreement the striking work force would be returned in large numbers over a short period of time" (Deposition of Harold Fields, Personnel Director, at 104-105; emphasis added).

(a), provides that the union "shall be the exclusive representative[] of *all the employees* in [the] unit for the purposes of collective bargaining in respect to * * * conditions of employment" (emphasis added). Even during a strike, the union represents all employees in the unit, including both the strikers and their replacements. *Pennco, Inc.*, 250 N.L.R.B. 716, 718 n.17 (1980), enf'd, No. 80-1654 (6th Cir. Mar. 16, 1982), petition for cert. pending (No. 81-2103, May 13, 1982); *C.H. Guenther & Son, Inc. d/b/a Pioneer Flour Mills*, 174 N.L.R.B. 1202, 1203 (1969), enf'd, 427 F.2d 983, 987 (5th Cir.), cert. denied, 400 U.S. 942 (1970); *Getlan Iron Works, Inc.*, 175 N.L.R.B. 864, 867 (1969). By making the union the exclusive representative of all the employees, the NLRA "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). See also *J.I. Case Co.* v. *NLRB*, 321 U.S. 332, 337 (1944) ("Individual contracts * * * may not be availed of * * * to forestall bargaining or to limit or condition the terms of the collective agreement"). As members of the bargaining unit, the strike replacements were therefore bound by the collective bargaining agreement negotiated by the Union to end the strike and had rights no greater than those recognized in the strike settlement agreement negotiated by the Union.[6]

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[6] The fact that the strike settlement agreement staggered the return of the strikers (see page 3, *supra*) indicates that the Union made some effort to accommodate the rights of both the strikers and the replacements. If the replacements believe that they were not fairly treated, they may file charges with the Board or a suit in state or federal court alleging that the

Since compliance with that agreement necessitated the discharge of the replacements, their rights were not violated, and their claim for breach of contract must necessarily fail.

Moreover, respondents' state breach of contract claim is based upon conduct that may be required or prohibited by the NLRA. Accordingly, respondents' claim is preempted. *Motor Coach Employees* v. *Lockridge, supra*, 403 U.S. at 288-289; *San Diego Building Trades Council* v. *Garmon, supra*, 359 U.S. 243. If the strikers were engaged in an unfair labor practice strike, the Company was required to offer them reinstatement and, if necessary, to discharge the replacements. *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 278 (1956). In addition, if the Company had refused to reinstate the strikers as required by the strike settlement agreement, it would have violated Section 8(a)(1). See *Puritana Manufacturing Corp.*, 159 N.L.R.B. 518, 533 (1966).

3. As we have attempted to show (see pages 6-8, *supra*), permitting a state to regulate employment offers made to strike replacements or to provide a contract remedy for replacements would involve such a danger of interference with the regulatory scheme of the NLRA that preclusion of such state authority is required. See *People* v. *Federal Tool and Plastics, Division of V.C.A.*, 62 Ill.2d 549, 553-554, 344 N.E.2d 1, 3-4 (Sup. Ct. 1975) (state statute requiring employers to notify prospective replacements that a strike is in progress is preempted by the NLRA because it burdens the employer's right to obtain strike replace-

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Union breached its duty of fair representation. See *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967).

ments and upsets the balance of economic power established by the Act). Therefore, contrary to the view of the Kentucky Court of Appeals, the situation here does not come within the exception to the preemption doctrine recognized by this Court in *Linn* v. *United Plant Guard Workers*, *supra*. See also *Farmer* v. *Carpenters*, 430 U.S. 290 (1977). That exception applies to matters that are a "peripheral concern" of the Act and involve a compelling state interest. However, the balance of economic weapons available to labor and management is the linchpin of national labor policy and thus may hardly be termed a peripheral concern of the Act. The same is indisputably true with respect to conduct either required or prohibited by the NLRA. Furthermore, in *Linn* and *Farmer* this Court found little risk that the "state cause of action would interfere with the effective administration of national labor policy" (*Farmer* v. *Carpenters*, *supra*, 430 U.S. at 298), because the state claims could be adjudicated without regard to the merits of the underlying labor controversy. Here, by contrast, in order to resolve the claim of misrepresentation, the state court would have to decide the labor law issue underlying the charges that the Union filed with the Board, *i.e.*, whether the strikers were engaged in an economic or an unfair labor practice strike.

4. The decision of the Kentucky Court of Appeals is not only contrary to well-established preemption principles, but, if left standing, would tend to discourage the peaceful settlement of labor disputes. "The National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers." *NLRB* v. *American National*

Insurance Co., 343 U.S. 395, 401-402 (1952). The importance of settlement agreements in the effective administration of the Act is firmly established. See *Poole Foundry & Machine Co.* v. *NLRB*, 192 F.2d 740, 742-743 (4th Cir. 1951), cert. denied, 342 U.S. 954 (1952). Obviously, an employer would be much less willing to settle a strike and pending unfair labor practice charges by agreeing to the reinstatement of strikers if such a settlement might result in substantial financial liability in a state court action. Instead, the employer would be encouraged to litigate the unfair labor practice claims in the hope of proving that the strike was economic. Thus, the decision below may lead to the prolongation of strikes and unnecessarily protracted litigation concerning unfair labor practice claims. Because that result would frustrate the policy of the NLRA, review by this Court is clearly warranted.[7]

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[7] The Court of Appeals' order reversing the trial court's grant of summary judgment and directing that court to proceed to hearing on the complaint definitively resolves the federal preemption issue and thus is a final judgment under 28 U.S.C. 1257. See *Construction Laborers* v. *Curry*, 371 U.S. 542 (1963); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 483 (1975).

CONCLUSION

The petition for a writ of certiorari should be granted.[8]

Respectfully submitted.

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National Labor Relations Board

MAY 1982

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[8] The Court may wish to consider summary reversal.

APPENDIX

The advertisement placed by the Company in the Louisville Courier Journal (Exh. A appended to the complaint) is as follows:

PERMANENT EMPLOYEES WANTED
BELKNAP, INC.
111 East Main Street
Louisville, Kentucky

Openings Available for Qualified Person Looking for Employment to Permanently Replace Striking Warehouse and Maintenance Employees.

Excellent Earnings, Fringe Benefits and Working Conditions With Steady Year-Round Employment.

Minimum Starting Rate $4.55 Per Hour. Top Rate $5.85, Depending on Skill, Ability and Experience. Plus Incentive Earnings Over Hourly Rate for Most Jobs.

Apply in Person at the Belknap Office Located 111 East Main Street Between 9:00 A.M. and 2:30 P.M. Monday Through Friday. Park in Company Lot at 1st and Main.

We Are an Equal Opportunity Employer

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 374717 905

Petitioner's Brief

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No. 81-1966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BELKNAP, INC.,

Petitioner

v.

DUWAINE E. HALE; MICHAEL WINBURN; JOSEPH JOHNSON, III; MICHAEL SIMMONS; MARK BAGSHAW; JIM CARLISLE; CHRIS JONES; JOHN MARSHALL; EUGENE BELL, III; DAN J. STEMMLE; GEORGE BOGGS; and PAUL LOGSDON,

Respondents.

On Writ of Certiorari to the Court of Appeals of the Commonwealth of Kentucky

BRIEF OF BELKNAP, INC., PETITIONER

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QUESTION PRESENTED

Whether a state court suit for damages alleging misrepresentation and breach of contract is preempted by the NLRA where: the suit is brought against an employer subject to the Act by employees hired as "permanent" replacements for strikers and subsequently laid off pursuant to the terms of a strike settlement agreement negotiated between the employer and the exclusive bargaining representative of its employees, and the settlement agreement was counseled and approved by the National Labor Relations Board.

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IN THE

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On Writ of Certiorari to the Court of Appeals of the Commonwealth of Kentucky

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BRIEF OF BELKNAP, INC., PETITIONER

OPINIONS BELOW

None of the opinions rendered by the various courts of the State of Kentucky is reproduced in either an official or unofficial reporter. All opinions are fully reproduced in the Joint Appendix to this brief and will be identified and referred to throughout the text hereof.

JURISDICTION

On April 24, 1981, the Kentucky Court of Appeals determined that the state claims of the Respondents were not preempted by the National Labor Relations Act. The petition of Belknap, Inc. to the Kentucky Supreme Court for review of this decision was ultimately denied on February 16, 1982. The 90-day period for seeking review thus began on February 16,

1982. *American Railway Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923). Belknap, Inc. filed its petition for a writ of certiorari with this Court on April 24, 1982. The Jurisdiction of this Court is invoked under 28 U.S.C. 1257(3), and the petition was filed within the time limits prescribed by 28 U.S.C. 2101(c).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

> U.S. Const. art. VI, cl. 2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et. seq.*), are as follows:

> Section 1. It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.
>
> Section 7. Employees shall have the right to self-organization to form, join or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall

also have the right to refrain from any or all of such activities . . .

Section 8(a). It shall be an unfair labor practice for an employer—

> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of this title; . . .
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .
>
> (5) To refuse to bargain collectively with the representatives of his employees . . .

Section 8(b). It shall be an unfair labor practice for a labor organization or its agents—

> (1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7 of this title . . .
>
> (2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . .

Section 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . .

Section 10(a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or maybe established by agreement, law, or otherwise . . .

STATEMENT OF THE CASE

On October 10, 1974, Teamsters Local Union No. 89 (hereinafter the "Union") was certified by the National Labor Relations Board (hereinafter the "NLRB" or the "Board") as the exclusive bargaining representative for certain warehouse and maintenance workers employed by Belknap, Inc. of Louisville, Kentucky (hereinafter the "Petitioner") (R. 93). On March 28, 1975, the Petitioner and the Union entered into a collective bargaining agreement which by its terms was effective from that date until midnight, January 31, 1978 (R. 94).

On December 15, 1977, the Union requested that the Petitioner begin negotiations for a new collective bargaining agreement (R. 84, 94). The parties began negotiations at that time and held seven negotiating sessions until January 30, 1978, at which time the parties had bargained to impasse (R. 84). As a result of this impasse in negotiations, approximately 400 of the Petitioner's employees went on strike beginning February 1, 1978 (R. 84-85). In order to continue operating its business, the Petitioner placed advertisements in a local newspaper for "permanent" replacements to replace the petitioner's striking employees, and several replacements were hired pursuant to the Petitioner's advertising efforts (R. 85).

The strike lasted from February 1, 1978, until July 17, 1978, during which time the Petitioner and the Union held fifteen additional negotiation meetings, all of which were participated in by the Federal Mediation and Conciliation Service (FMCS) (R. 85).

During the pendency of this strike, a number of unfair labor practice charges were filed against the Petitioner and the Union with the National Labor Relations Board, Region 9, located in Cincinnati, Ohio (R. 85). On April 24, 1978, Emil C. Farkas, the Regional Director for Region 9, issued a formal complaint in Board Case No. 9-CA-12273, alleging that the Petitioner had implemented a unilateral wage increase without first notifying the Union, and it was further complained that such action constituted violations of Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the National Labor Relations Act, as amended (hereinafter the "Act") (R. 92-96).

Prior to the time that a hearing was scheduled on the above unfair labor practice complaint, Regional Director Farkas directed that the parties attend a conference at the Board's offices in Cincinnati, Ohio, for the purposes of attempting to settle both the pending unfair labor practice charges and complaints and the underlying labor strike. This meeting was held on July 17, 1978, and was attended by representatives from both the Petitioner and the Union as well as Regional Director Farkas and three of his staff attorneys (R. 85-86).

During this meeting, Regional Director Farkas held separate conferences with representatives of the Petitioner and the Union in order to ascertain the principal areas of disagreement which had theretofore prevented settlement of the strike (R. 86). During his conference with the Petitioner, Mr. Farkas advised that if a settlement agreement could not be worked out to end the strike, the Board would proceed to a hearing on the Section 8(a)(5) complaint, and that if the Board prevailed in this matter, the Petitioner could be forced to immediately terminate all replacements and reinstate all of the strikers (Deposition of Harold Fields, at 111-112). Mr. Farkas informed and assured the parties, however, that if a strike settlement agreement could be reached, the Board would be willing to dismiss all outstanding unfair labor practice charges and complaints (R. 86-87).

In light of the representations made to the parties by Regional Director Farkas, and largely as a result of the Board's conciliation efforts at this meeting, the Petitioner and the Union made various concessions on several fundamental matters of disagreement, such as rates of pay, eligibility for vacations, and the duration of the new collective bargaining agreement.

The major obstacle to a complete agreement, however, was the insistence by the Union that the Petitioner terminate all replacement employees immediately upon settlement and correspondingly offer immediate reinstatement to all strikers. This was a condition of settlement upon which the Union had insisted throughout the course of the strike and one which the Petitioner had repeatedly rejected (R. 87). On this point, Regional Director Farkas proposed that, as a compromise, the parties try to reach an agreement whereby the strikers would be

offered reinstatement gradually on a fixed recall schedule (R. 87). After exhaustive negotiations on this point, it was finally agreed that the Petitioner would offer reinstatement to the strikers at a minimum rate of 35 employees per month until all strikers had been offered reinstatement (R. 87). This obstacle having been removed, the parties reduced to writing and entered into the following strike settlement agreement:

MEMORANDUM OF AGREEMENT

This Memorandum Of Agreement, made and entered into this 17th day of July, 1978 by and between Belknap, Inc., hereinafter referred to as the "Company", and General Drivers, Warehousemen and Helpers, Local Union No. 89, hereinafter referred to as the "Union",

WITNESSETH:

Whereas, the Union is the collective bargaining representative of the Company's Warehouse and Maintenance employees at its facilities located at 111 E. Main Street, Louisville, Kentucky, and whereas the employees went out on strike called against the Company by the Union on February 1, 1978 because of the failure of the Company and Union to reach agreement upon a collective bargaining agreement, and whereas, the Company and the Union have now reached agreement on a collective bargaining agreement and now desire to make a memorandum of the agreement reached between the parties, now, therefore, the Company and the Union agree with each other as follows:

1. The Union agrees to the Company's last and best proposal, submitted to the Union on January 30, 1978 with the following changes, additions and modifications:

A. Paragraph 18 of the Company's Last and Best Proposal is amended so as to read as follows:

"Any employee who works a total of 7 hours (*including overtime hours*) on the last scheduled workday prior to and the first scheduled workday after a holiday (including the last scheduled workday prior to and the first scheduled workday after a period of temporary layoff not to exceed 10 consecutive workdays as aforesaid) shall be considered to have worked the "full scheduled workday on each of those days".

B. The Company agrees to amend the proposal set forth in Paragraph 2 of its Last and Best Proposal so as to change the word "minimum" in the new Section 4 of Article XI to read "maximum".

C. With regard to Paragraph 6 of the Company's Last and Best Proposal, the Company and the Union have agreed that the contract shall become effective on July 17, 1978 and continue in full force and effect through midnight on January 31, 1982.

D. The Company and Union agree to amend Paragraph 9 of the Company's Last and Best Proposal as hereafter set forth in this Memorandum of Agreement.

2. *Wages*

I. Referring to Exhibit A which was presented to the Union on 12-22-77 and incorporated in the Company's Last and Best Proposal, the Company agrees to increase the rates of pay specified on said Exhibit A in the following amount on the following dates:

(i) Effective on July 17, 1978, the Company agrees to increase fifty cents (50¢) per hour;

(ii) On the first anniversary date of the agreement, namely July 17, 1979, the Company agrees to further increase the rates forty cents (40¢) per hour;

(iii) On the second anniversary date of the agreement, namely July 17, 1980, the Company agrees to further increase the rates sixty cents (60¢) per hour, which rate increase will extend to the expiration date of the contract, January 31, 1982.

II. Effective on July 17, 1978, the Company agrees to grant a one-time 25¢ per hour increase in the base rate of those employees classified as "maintenance" and exclusive of the classifications of "Maintenance—Power Plant" and "Maintenance Helper".

III. In addition to the foregoing modifications of the foregoing Company's Last and Best Proposal, the Company and Union further agree as follows:

A. *Union Security*—The Company agrees to change its proposal from a maintenance of membership provision as submitted to the Union on 2-21-78 to a modified shop union security provision which was incorporated in the expired 1975-1978 contract.

B. *Overtime*—The Company will give the Union a letter of understanding setting forth that, when overtime work is scheduled, the Company will endeavor to give employees as much notice as is reasonably possible. This is to be a non-contractual commitment on the part of the Company

and the application of this non-contractual commitment shall not be subject to the grievance and arbitration provisions of the contract.

C. *Vacations*—The Company agrees to reduce the vacation eligibility hours provided for in Article XXIII, Section 6(b), from 1500 to 1450. The Company further agrees to give the Union a letter of understanding stating that the Company will treat recalled former striking employees as new hires under Article XXIII, Section 3 for vacation pay computation purposes in accordance with the following procedure. In the event that a recalled former striking employee has more than 12 but less than 24 months of continuous service on May 1, 1980 since the day of his recall, and otherwise qualifies for vacation pay under Article XXIII, Section 6(b), he shall be paid 2% of his entire gross earnings for the period from the time of his recall and return to work.

D. *Leadperson*—The Company agrees to red circle the base rate (not the incentive rate) of employees who were formally in the now deleted Leadperson job classification.

E. *Recall of Former Striking Employees*—The Company agrees to offer reinstatement to former striking employees at the rate of 35 employees per month until such time as all former striking employees have been offered reinstatement. The Company and the Union agree that the Company may

> recall such employees into any available job which the recalled employee is qualified to perform, and that the Company is not required to follow strict order of seniority in the process of recalling these employees, but will make an earnest effort to do so. The Company and the Union further agree that, in the event it is necessary that the Company terminate replacement employees in order to comply with this recall schedule, such termination shall not be subject to the grievance and arbitration provisions of the contract.
>
> F. *Pending Litigation*—The Company and the Union agree to dismiss all claims asserted in the damage suit pending in the Jefferson Circuit Court (Belknap, Inc. v. General Drivers, Warehousemen and Helpers, Local Union No. 89, et. al., Jefferson Circuit Court, Division Thirteen, Civil Action No. 78C101745.).
>
> * * *

Pursuant to the strike settlement agreement, the five-month old strike came to an end and all pending unfair labor practice charges and complaints were dismissed. In compliance with the recall provision of the agreement, the Petitioner began its offers of reinstatement to the former striking employees. In order to fully meet its contractual obligations in this regard, it was necessary for the Petitioner to lay off striker replacements in order to make room for the returning former strikers (R. 88). Many of the replacements were thus placed on permanent layoff status, with written assurance that they would be given first consideration in the event that future employment needs arose (R. 88-89).

The Respondents in the instant case were each hired as striker replacements by the Petitioner during the strike and

were subsequently laid-off by the Petitioner in accordance with the express terms of the recall provision of the strike settlement agreement (R. 88). The Respondents thereafter filed suit in the Circuit Court of Jefferson County, Kentucky, seeking compensatory and punitive damages against the Petitioner amounting to $500,000.00 for each Respondent based on state claims of misrepresentation and breach of contract (J.A. 6-8).

The Petitioner, in response to these claims, first raised the issue of preemption on Motion for Summary Judgment before the Jefferson County Circuit Court. (J.A. 7, R. 49-81). That court agreed that the subject matter of the Respondent's complaint was preempted by federal law and, accordingly, the Petitioner's Motion for Summary Judgement was granted (J.A. 9). The Respondents appealed this decision to the Kentucky Court of Appeals, and that court reversed (J.A. 14-18). The Petitioner sought discretionary review of this ruling in the Supreme Court of Kentucky (J.A. 19). That court originally granted review; however, after briefs were filed and oral arguments heard, the court decided that review had been improvidently granted. Accordingly, the court vacated its review order and remanded the case to the Kentucky Court of Appeals on February 16, 1982. (J.A. 20).

Belknap, Inc. filed a petition for writ of *certiorari* with this Court on the issue of preemption of the aforementioned state claims on April 24, 1982. The National Labor Relations Board thereafter filed a brief as *amicus curiae* in support of the petition, and the petition was granted by this Court on June 21, 1982. While the petition sought a writ of certiorari to the Supreme Court of Kentucky, that Court, by vacating its order of discretionary review, did not rule on the merits of the preemption issue. Accordingly, it is the ruling of the Kentucky Court of Appeals which the Petitioner seeks reversal by this Court.

SUMMARY OF ARGUMENT

1. The Respondents' state claims for misrepresentation of their employment offers as for "permanent replacement" status concerns conduct which was arguably prohibited by Section 8 of the NLRA. It is unclear whether the strike was an economic

strike or an unfair labor practice strike at the time the Respondents were hired. If the strike was an unfair labor practice strike, then hiring permanent replacements would have been prohibited by Section 8(a)(1) of the Act, and the Petitioner would have been required by federal law to reinstate the strikers even if this required the termination of their replacements. Failure to provide for the unconditional reinstatement of unfair labor practice strikers, regardless of an employer's motivation in making representations of permanent replacement status to striker replacements, is prohibited by Sections 8(a)(1) and 8(a)(3) of the Act. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956); *NLRB v. Top Mfg. Co., Inc.*, 594 F.2d 223, 225 (9th Cir. 1979). Allowing a state claim by striker replacements whose layoff is required by federal law would present a direct conflict in state and federal regulation of the same activity, and is thus preempted on the ground that the states may not interfere with conduct that is either arguably protected by Section 7 or arguably prohibited by Section 8 of the Act. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

2. If the strike was an economic strike rather than an unfair labor practice strike at the time the offers and assurances of "permanent replacement" status were made, then the Respondent's misrepresentation claims are preempted under the decisions of this Court which prohibit the states from interfering with the use of an economic resource designed to be left unregulated and controlled by the free play of economic forces. *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976); *Teamsters Union v. Morton*, 377 U.S. 252 (1964). If the strike was an economic strike, then the Petitioner had the right to advertise for and hire permanent replacements. *NLRB v. Mackay Radio & Telephone Co.*, 304 U.S. 333 (1938). The term "permanent replacement" carries a federally defined meaning which cannot be subjected to conflicting requirements of state law if the right of employers to utilize this economic weapon during economic strikes is to be preserved.

3. The state claims concerning the Respondents' layoffs are preempted because the subject matter deals with activity which was arguably required by the Act. If the strike was an

unfair labor practice strike, then federal law would have required unconditional reinstatement of the former strikers and the resulting layoffs of their replacements. *Mastro Plastics Corp. v. NLRB, supra.* Allowing a state claim for relief by replacements whose layoffs were required by federal law would present a direct conflict in the application of federal and state law dealing with the same conduct. *San Diego Building Trades Council v. Garmon, supra.*

4. The Respondents were members of the bargaining unit represented by the Union and their employment relationship with the Petitioner was governed by the terms of the collective bargaining agreement negotiated between the Petitioner and the exclusive bargaining representative of the bargaining unit to which the Respondents belonged. *Leveld Wholesale, Inc.*, 218 N.L.R.B. 1344, 1350 (1975). The strike settlement agreement expressly required recall of the striking employees even if this meant having to lay off the striker replacements. Whatever individual understandings the Respondents may have had concerning their employment with the Petitioner were superseded to the extent they conflicted with the recall requirements of the negotiated strike settlement agreement. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967). The Respondents' layoffs were required by the collective bargaining agreement and cannot be held illegal under conflicting principles of state law concerning individual contracts of employment.

5. The recall provision of the strike settlement agreement was counselled and approved by the NLRB in furtherance of that agency's successful attempt to settle both the labor strike and the pending unfair labor practice charges and complaints. To allow state claims which conflict with the obligation to honor a collective bargaining provision specifically sanctioned by the Board would interfere with the Board's administration of the Act and would frustrate the national labor policy of encouraging collective bargaining as the primary means for peaceful resolution of industrial disputes. *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952).

6. The decision by the Kentucky Court of Appeals, undisturbed by the Supreme Court of Kentucky, held the

Respondents' claims not preempted based on a general misapplication of federal labor law and the misinterpretation of this Court's decision in *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966). The Court of Appeals held that the Respondents' claims were of peripheral concern to the NLRB and fell within the ambit of conduct of such compelling concern to the State that the normal grounds for preemption under the Act were vitiated. It is clear, however, that the subject matter of the Respondents' claims was and is of paramount concern to the NLRB and to the proper administration of the complex federal policies both explicit and inherent in the NLRA. Further, the Respondents' claims involve a risk of interference with the federal scheme that far outweighs the interest of the State in assuming jurisdiction over those claims, and thus the narrow exception to the preemption doctrine in *Linn* is inapplicable to the case at bar.

ARGUMENT

I.

RESPONDENTS' MISREPRESENTATION CLAIM IS PREEMPTED BY FEDERAL LAW

A. Respondents' Misrepresentation Claim Concerns Conduct Which, Depending On The Legal Character Of The Strike At The Time The Employment Offers Were Made, Was Prohibited By Section 8 of the NLRA.

As a fundamental principle, this Court has declared that the States are preempted from regulating conduct which is either arguably protected by Section 7 or arguably prohibited by Section 8 of the Act. *Motor Coach Employees v. Lockridge*, 403 U.S. 271 (1971); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). This rule is based upon the reasoning that Congress, in furtherance of its enactment of a comprehensive body of federal laws governing the areas of labor relations, established an expert administrative agency with adjudicative powers specifically designed to ensure uniform application of the regulatory provisions of the Act. The

National Labor Relations Board has primary responsibility for determining the applicability of the Act to a given factual situation involved in an industrial dispute, and Congress, by means of this jurisdictional grant of adjudicative authority, sought to prevent the potential conflict which could result from regulation of the same conduct by a multiplicity of tribunals. As articulated by the Court in *Garner v. Teamsters Local No. 776*, 346 U.S. 485 (1953):

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and the application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid the diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies. 346 U.S. at 490-491.

In accordance with this reasoning, the Court in *Garmon* established the following rule concerning the preemption of state claims:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the Federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of Federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial

relations. Regardless of the mode adopted, to allow the states to control that which is the subject of national regulation would create potential frustration of national purposes. 359 U.S. at 244.

In the instant case, the Respondents alleged that the Petitioner misrepresented its offers for "permanent" replacement status to striker replacements because the Petitioner knew, at the time the offers were made, that it would recall the striking employees and discharge the replacement employees (J.A. 4-5). It is submitted that this allegation, when analyzed under the aforementioned preemption theory, concerns conduct with which the states cannot interfere if national labor policy is to be effectuated.

Offers of permanent replacement status to striker replacements concerns activity which, depending upon the legal character of the strike, is prohibited by Section 8 of the Act. If, as alleged by the NLRB in its complaint against the Petitioner issued in Board Case No. 9-CA-12273, the wage increase implemented by the Petitioner on February 5, 1978, was a violation of Section 8(a)(5) of the Act, then the strike may have been converted from an economic strike to an unfair labor practice strike, at which point the Petitioner would not have had the legal right to hire permanent replacements. *Philip Carey Manufacturing Co., Miami Cabinet Div. v. NLRB,* 331 F.2d 720, 729 (6th Cir. 1964), *cert. denied,* 379 U.S. 888; *NLRB v. Johnson Sheetmetal, Inc.,* 442 F.2d 1056, 1061 (10th Cir. 1971).[1] If such a conversion occurred, then representations

[1] An economic strike is one called to obtain concessions over bargaining proposals concerning wages, hours, or other terms of conditions of employment to be contained in a collective bargaining agreement. *NLRB v. Fleetwood Trailer Co.,* 389 U.S. 375, 380 (1967). An unfair labor practice strike generally refers to a strike called in response to an employer's violation of the Act. If, however, during an economic strike an employer commits what is later determined by the Board to have been an unfair labor practice, then the strike is converted to an unfair labor practice strike if prolonged beyond its natural duration to protest the unfair labor practice. In such a case, the strikers become unfair labor practice strikers on the date of the conversion, and are entitled to immediate reinstatement upon an unconditional offer to return to work if they were not permanently replaced prior to the conversion. See, Stewart, *Conversion Of Strikes Economic To Unfair Labor Practice,* 45 Va. L. Rev. 1332 (1959).

by the Petitioner of permanent replacement status could not have been made after the date of conversion without violating Section 8(a)(1) of the Act. *NLRB v. Laredo Coca-Cola Bottling Co.*, 613 F.2d 1338 (5th Cir. 1980), *cert. denied*, 449 U.S. 889; *Carpenters District Council of Jacksonville*, 221 N.L.R.B. 876 (1975). Moreover, if the strike was converted to an unfair labor practice strike, the Petitioner would have been forced to reinstate the strikers even if this meant terminating all of the replacement employees. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956).

The danger of conflicting regulation by the State of conduct subject to the exclusive jurisdiction of the Board is readily apparent. If the strike was in fact an unfair labor practice strike, then not only would the representation of permanent replacement status have constituted an unfair labor practice under Section 8(a)(1) regardless of the Petitioner's motivation in making such representations, but if the Petitioner thereafter refused to reinstate the strikers, this would have constituted additional violations of Sections 8(a)(1) and 8(a)(3) of the Act. *NLRB v. Top Manufacturing Co. Inc.*, 594 F.2d 223, 225 (9th Cir. 1979). Thus, were it ultimately to be determined that the strike was an unfair labor practice strike, if a state cause of action for misrepresentation of the employment offers could be maintained, the Petitioner would be confronted with the anomalous situation of either having to lay off the replacements in order to comply with the requirements of federal law or of having to refuse to lay off the replacements in contravention of federal law in an attempt to avoid the imposition of substantial financial liability predicated on a state claim for misrepresentation. Since this would result in a direct conflict in the requirements of state and federal law concerning the same conduct, preemption of the Respondents' misrepresentation claim is mandated.

B. The Hiring Of Permanent Striker Replacements Is Conduct Protected By Federal Law.

A second basic theory of preemption under the Act is founded upon the proposition that the States are preempted from regulating conduct which, although neither arguably protected nor prohibited by the Act, was intended by Congress to be left unregulated and controlled by the free play of economic forces. *Machinists v. Wisconsin Employment Relations Commission,* 427 U.S. 132 (1976). This theory is predicated on the realization that the use of peaceful economic weapons during periods of labor strife forms an integral part of the collective bargaining process, and that in addition to the overall balance of protection and prohibition embodied in the substantive provisions of the Act, Congress intended to leave unregulated certain economic weapons available to management and labor. It was the intention of Congress that the utilization of these economic weapons not be subject to regulation either by the States or by the NLRB. *Machinists v. Wisconsin Employment Relations Commission, supra; Teamsters Union v. Morton,* 377 U.S. 252 (1964).

It is well settled that, in those situations where collective bargaining fails to resolve industrial disputes concerning wages, hours and other terms and conditions of employment, Congress intended that there be a rough balance in the arsenal of economic weapons available to labor and management. *American Shipbuilding Co. v. NLRB,* 380 U.S. 300, 316 (1965); *Carpenters Union v. NLRB,* 357 U.S. 93, 99-100 (1958). The principal weapon available to labor as guaranteed by Sections 7 and 13 of the Act is the right to strike in support of its economic demands. See, *NLRB v. International Rice Milling Co.,* 341 U.S. 672-677 & n. 8 (1951). To counterbalance the use of this weapon, employers have the right to hire permanent striker replacements during an economic strike. *NLRB v. Mackay Radio & Telephone Co.,* 304 U.S. 333 (1938). The term "permanent replacement" when used in the context of a labor strike has a particular meaning ascribed to it by federal law. A permanent replacement is an employee who is hired during an economic strike and whom the employer is not required to terminate in order to reinstate former economic strikers once

the strike is over. *NLRB v. Mackay Radio & Telephone Co., supra.* The former strikers remain employees within the meaning of the Act, however, if they apply for unconditional reinstatement even though their positions have been filled by permanent replacements, and are entitled to non-discriminatory reinstatement as job openings become available. *Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968), *enf'd*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

It is submitted that to allow a state claim for misrepresentation based on characterization of the employment offers to striker replacements as "permanent" would permit each state to fashion its own meaning of permanent replacement status and would necessarily impinge on the right of employers to fully utilize this federally protected right. Heretofore, the employment of permanent replacements has never been held to preclude collective bargaining negotiations with the Union over the recall of its striking members, a matter of obvious significance to the strikers, their replacements, and the collective bargaining representative.[2] If an employer could be subjected to substantial financial liability for agreeing to recall the strikers as part of a strike settlement agreement, as a practical matter, the employer would have the alternative of either being constrained from hiring permanent replacements altogether, in which case the theoretical right becomes illusory; or the employer could hire permanent replacements and thereafter be constrained to refuse to agree to recall the striking employees even though such agreement might settle a labor strike. The latter situation would inevitably prolong economic strikes and frustrate the collective bargaining process.

It is precisely this type of state interference with conduct designed to be left unregulated which prompted the preemption rationale enunciated by this Court in the *Morton* case and later embraced in *Machinists.* This rationale mandates that the States not seek to apply their substantive or remedial laws to labor-related conduct where such application would necessarily involve weighing the same competing interest of employers, employees, labor unions and the public which Congress sought

[2] In fact, it would arguably be an unfair labor practice strike for an employer to refuse to bargain over the issue of recalling economic strikers.

to balance in leaving a particular area unregulated. See, Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1365 (1972).

When an employer exercises its federal right to hire permanent replacements, this is necessarily accomplished in furtherance of the legitimate and protected labor objectives of continuing business operations during an economic strike and thereby attempting to combat the economic difficulties occasioned by having employees go on strike in support of their bargaining demands. Allowing state judicial inquiry into such subsidiary areas of subjective motivation as whether the employer knew that it had the right to agree to recall the strikers or intended to accede to union demands to recall the strikers in order to settle the strike would be to allow the states to nullify an employer's ability to exercise this federal right. This interference by the State of conduct designed to be left unregulated further compels a holding that the Respondents' claim of misrepresentation is preempted.

II.

RESPONDENT'S BREACH OF CONTRACT CLAIM IS PREEMPTED BY FEDERAL LAW

A. Respondent's Breach Of Contract Claim Concerns Conduct Which, Depending On The Legal Character Of the Strike, Was Arguably Required By The NLRA

If the labor strike involved in this case was an unfair labor practice strike at the time the Respondents were hired, then the striking employees would have been entitled to immediate reinstatement upon their unconditional offer to return to work. *Mastro Plastics Corp. v. NLRB, supra.* Since this reinstatement right would vest regardless of whether the Petitioner was forced to discharge striker replacements, refusal by the Petitioner to reinstate the strikers in order to avoid liability predicated on a state claim for either misrepresentation or breach of contract would violate Sections 8(a)(1) and 8(a)(3) of the Act. *NLRB v. Top Manufacturing Co., Inc., supra.* This would present a clear and direct conflict in the requirements of federal and state

law, and, accordingly, preemption of the breach of contract claim is mandated. *Motor Coach Employees v. Lockridge, supra; San Diego Building Trades Council v. Garmon, supra; Garner v. Teamsters Local No. 776, supra*

B. The Terms Of The Negotiated Strike Settlement Agreement Supersede Any Conflicting Employment Understandings Which May Have Existed Between The Petitioner And The Respondents

It is undisputed that the Respondents were placed on permanent layoff in accordance with the express requirements of the recall provision embodied in the negotiated strike settlement agreement (J.A. 24). The substantive law of contracts applicable to collective bargaining agreements is federal and not state law. *Teamsters Local No. 174 v. Lucas Flower Co.*, 369 U.S. 95, 102-104 (1962); *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-457 (1957). As applied to the situation in the case at bar, it is well established by federal law that incidents of employment individually bargained with employees are superseded to the extent they conflict with the terms of a collective bargaining agreement negotiated by the employer and the certified bargaining representative of its employees. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967); *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). Section 9(a) of the Act provides that the Union "shall be the exclusive representative of all employees in [the] unit for purposes of collective bargaining in respect to rates of pay, wages, hours . . . or other conditions of employment." This principle of exclusivity thus "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representatives *to act in the interest of all employees.*" *NLRB v. Allis-Chalmers Mfg. Co., supra, at 175* (emphasis added).

Teamsters Local No. 89, as the certified bargaining representative of the Petitioners' employees, was the exclusive bargaining representative for both the striking employees and their replacements. *Pennco, Inc.*, 250 N.L.R.B. 716, 718 (1980), *enf'd*, No. 80-1654 (6th Cir. Mar. 16, 1982), petition for cert. pending (No. 81-2103, filed May 13, 1982); *C.H. Guenther & Son, Inc. d/b/a/ Pioneer Flour Mills*, 174 N.L.R.B.

1202, 1203 (1969), *enf'd.* 227 F.2d 983, 987 (5th Cir.) *cert. denied,* 400 U.S. 942 (1970); *Leveld Wholesale, Inc.,* 218 N.L.R.B. 1344, 1350 (1975). The recall provision of the strike settlement agreement provided that the strikers were to be reinstated at a minimum rate of 35 employees per month and that this was to be accomplished even if it required laying off the striker replacements (J.A. 24). Whatever employment understandings the Respondents may have had concerning the actual duration of their employment were superseded by the collective bargaining agreement and, accordingly, their layoffs did not constitute a breach of contract under the controlling principles of federal law. To hold otherwise would be to grant the States power to declare that individual employment contracts take precedence over conflicting terms of a negotiated collective bargaining agreement. This would be an entirely new direction in the law as it has been understood for over thirty years and would seriously undermine the intent of Congress to promote collective bargaining and encourage adherence to the terms of a negotiated collective bargaining agreement.

III.

STATE JURISDICTION OVER THE RESPONDENTS' CLAIMS WOULD INTERFERE WITH THE ADMINISTRATION OF THE ACT BY THE NLRB

The national labor policies embodied in the Act are designed not only to regulate the labor practices of unions and management, but also to encourage and promote collective bargaining as the means for achieving peaceful resolution of industrial disputes. *NLRB v. American National Insurance Co.,* 343 U.S. 395 (1952); *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937). The importance of reaching settlement agreements in order to bring an end to labor strikes is a fundamental goal of this federal policy. *See, Poole Foundry and Machine Co. v. NLRB,* 192 F.2d 740, 742-743 (4th Cir. 1951), *cert. denied,* 342 U.S. 954 (1952).

The sequence of events which gave rise to the instant controversy evolves from a collective bargaining agreement

entered into by an employer and a labor union for the purpose of bringing an end to a labor strike. As discussed in the Statement of the Case, there were a number of unfair labor practice allegations directed against both the Petitioner and the Union concerning strike-related activities by the parties, and the NLRB became actively involved in the labor dispute through its investigation of the various charges and its appropriately aggressive pursuit of settlement of the issues. Significantly, it was largely through the conciliation efforts of the Board that resolution of the strike was finally achieved, and as a result of the various concessions made by the parties at the settlement conference culminating in an agreement, the Board dismissed all outstanding unfair labor practice charges and complaints with the express concurrence of the parties. Thus, through the mutual efforts of the Board, the Petitioner and the Union, a collective bargaining agreement was reached and industrial peace and stability were restored. A clearer fulfillment of the purposes and policies both explicit and inherent in the Act is difficult to perceive.

If the state claims involved in the case at bar are held not preempted, this would have the potential of disrupting the conciliation and settlement processes necessary to ensure effective administration of the policies of the Act by the Board. Employers and labor unions would hereafter necessarily be unsure whether a Board-sanctioned strike settlement agreement would be afforded insulation against state claims resulting from adherence to the express provisions of the agreement. As applied to the facts in the instant case, employers that hire "permanent" replacements during a labor strike would be effectively precluded from ever agreeing to a Board-encouraged bargaining provision to recall strikers, and would similarly be forced to litigate unfair labor practice complaints issued during the strike in order to try to establish that the strike was economic. Only by successfully defending an unfair labor practice complaint would an employer be able to comply with the requirements of federal law and retain the striker replacements and, at the same time, avoid the risk of financial liability which could result from state claims filed by replacements whose layoffs were required by federal law if state court actions such as those involved herein are not preempted. Not only

would this force the Board to reallocate its time and resources to litigating rather than settling unfair labor practice charges, it would likewise interfere with the conciliation efforts of the agency to assist labor and management in reaching agreements to settle labor strikes.

Moreover, in balancing the competing interests of the Respondents against those of the Petitioner, the Union and other employees, the determination of whether the purposes of the Act are best effectuated by allowing the requirements of a negotiated strike settlement agreement to prevail is a matter subject to the exclusive jurisdiction of the NLRB in accordance with that agency's obligation to ensure the uniform application of the complex and competing policies embodied in the Act. As articulated by this Court in *Garmon:*

> The nature of the judicial process precludes an ad hoc inquiry into the special problems of labor-management relations involved in a particular set of occurrences in order to ascertain the precise nature and degree of federal-state conflict there involved, and more particularly what exact mischief such a conflict would cause... To the National Labor Relations Board and to Congress must be left to those precise and closely limited demarcations that can be adequately fashioned only by legislation and administration. We have necessarily been concerned with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of substantive law and differing remedial schemes. But the unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and accumulative experience... Administration is more than a means of regulation; administration is regulation. 359 U.S. at 242-243.

Allowing state claims for relief in the circumstances of this case would eviscerate the administrative authority of the NLRB

in balancing the federal policies embraced in the protected rights accorded by Section 7 and enforced through Section 8 of the Act against the federal policy of facilitating the peaceful resolution of industrial disputes through encouragement of the collective bargaining process. This potential conflict in federal and state regulation of the same conduct requires the preemption of the Respondents' state claims.

There must be a prophylactic zone of federal protection immune from state interference afforded to the process of resolving industrial disputes if the congressional objective aimed at the expeditious and peaceful resolution of such disputes is to be realized. This is especially important where, as in the case *sub judice*, the NLRB actively encourages the parties to agree on the very provision of a negotiated strike settlement agreement which is later made the subject of claims for relief grounded on state law. To allow such state actions to go forward would impermissibly intrude into an area where federal law and policy are legislatively and judicially pervasive. *Motor Coach Employees v. Lockridge, supra.*

IV.

THE EXCEPTIONS TO THE PREEMPTION DOCTRINE ARE NOT APPLICABLE TO THE INSTANT CASE

The Petitioner recognizes that this Court has found exceptions to the general rule of preemption and the States have been allowed to exercise jurisdiction over certain types of conduct involved in industrial disputes where such subject matter has been deemed not to interfere with the paramount federal scheme underlying the NLRA. It is submitted that none of these exceptions is applicable to the instant case.

The vast majority of decisions by this Court where state jurisdiction has been upheld have dealt with situations where the States have sought to regulate such traditional areas of parochial concern as violence, threats of violence, intimidation and the preservation of public peace and order. *United Automobile Workers v. Russell*, 356 U.S. 636 (1958); *United Construction Workers v. Laburnum Construction Company*, 347

U.S. 656 (1954); *Allen-Bradley Local v. Wisconsin Employment Relations Board,* 315 U.S. 740 (1942). The basis of these decisions, that the maintenance domestic peace is a matter of compelling state interest not to be overridden absent a clear expression of congressional intent to the contrary, is manifest. *San Diego Trades Council v. Garmon, supra,* at 247.

As first enunciated by the Court in *Garmon,* the preemption doctrine will not be applied where the activity sought to be regulated is of peripheral concern to the Act or "where the regulated conduct [touches] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [it] could not [be inferred] that Congress has deprived the States of the power to act." 359 U.S. at 243-244. The conduct in the case *sub judice* does not represent such an exception.

In *Linn v. United Plant Guard Workers,* 383 U.S. 53 (1966), the only Supreme Court case relied upon by the Kentucky Court of Appeals to hold the Respondent's state claims not preempted, this Court held the *Garmon* test applicable to a situation involving the alleged malicious libel of an officer of an employer by a labor union during an organizational campaign. In *Linn,* the Court began its opinion by recognizing that the critical inquiry was whether a state action for malicious libel "might interfere with. . . national labor policies." 383 U.S. at 58. In holding that such potential for interference did not exist, the Court noted that the Board was concerned only with whether the statements involved constituted a material misrepresentation within the meaning of *Hollywood Ceramics Co.,* 140 N.L.R.B. 221 (1962). It was pointed out that the Board had considered and dismissed unfair labor practice charges filed by the employer alleging that the statements "restrained and coerced [the] employees in the exercise of their Section 7 rights in violation of Section 8(b)(1)(A) of the Act." 358 U.S. at 56. Since the alleged unfair labor practice applied only to the employees and not to the defamed individual, it was held that the Board's inability to afford relief to the aggrieved party, considered together with the Board's lack of concern over the alleged defamatory nature of the statements, led to the conclusion that a state cause of action

for malicious libel under the circumstances was of peripheral concern to the Act. The Court further held that, as in cases involving intimidation and violence, the concern of the State with redressing malicious libel was a matter of deep local feeling and concern so as to preclude preemption under the exception articulated in *Garmon.*

In reaching the decision in *Linn,* the Court made it clear that its ruling constituted an extremely narrow exception to the general rule of preemption and was predicated in large part on the severability of the conduct complained of from the labor-related objectives of the union. The Court emphasized that "[j]udicial condemnation of the alleged attack on Linn's character would reflect no judgment upon the objectives of the Union. It would not interfere with the Board's jurisdiction over the merits of the labor controversy." 383 U.S. at 64. Further, the Court mandated that, in view of the possibility that state claims for libel might chill the free debate envisioned by the Act in the context of union organizing compaigns, recovery at the state level could not be had unless the plaintiff was able to meet the rigorous standards set forth in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), requiring proof both of the malice and of resulting injury. It was reasoned that:

> Under the rules laid down here [the dispute] can be appropriately redressed without curtailment of state libel remedies beyond the actual needs of national labor policy. However, if experience shows that a greater curtailment, even a total one, should be necessary to prevent impairment of that policy, the Court will be free to reconsider today's holding. 383 U.S. at 67.

This reasoning was later adopted by the Court in *Farmer v. Carpenters,* 430 U.S. 290 (1977), where it was held that the Act did not necessarily preempt a state claim for intentional infliction of emotional distress filed by a union member against his union alleging outrageous conduct involving repeated threats and instances of intimidation by the labor organization. The Court in *Farmer* prefaced its ruling by recognizing that preemption under the Act was necessary where state rules of law, remedy or administration would conflict with the "broad

powers conferred by Congress upon the National Labor Relations Board to interpret and to enforce the complex Labor Management Relations Act." 430 U.S. at 295. The Court further instructed, however, that the outrageous nature of the conduct complained of involved little potential of actual conflict with the policies behind the Act and consequently did not involve a risk of touching on an area of primary federal concern. In reaching this decision, the Court stressed that, as in *Linn,* a state claim concerning this type of outrageous conduct would not result in regulation of activities Congress intended to protect, it would not interfere with the effective administration of labor policy by the Board, and the dispute concerned a matter of overriding state interest which could be adjudicated without regard to the merits of any underlying labor controversy. In holding the state claim not preempted, the Court in *Farmer* again embraced an underlying theme of the *Linn* decision in that the conduct complained of was determined to be severable from conduct relating to legitimate labor activity, and, in defining the degree of severity necessary to meet the standard of "outrageous" conduct so as to allow state jurisdiction, the Court declared that the conduct complained of had to be so extreme that "no man in a civilized society should be forced to endure it." 430 U.S. at 302.[3]

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[3] Since the decision in *Farmer,* federal circuit courts have had occasion to apply the "outrageous conduct" standard to state tort and breach of contract claims involving employee discharges. In the context of such claims where the discharges involved considerations of federal labor law and policy, it has been held that state claims can only be actionable if the harm alleged is a function of the particularly abusive manner in which the discharges are accomplished, rather than as a function of the discharges themselves. *Magnuson v. Burlington Northern, Inc.,* 576 F.2d 1367 (9th Cir. 1978) *cert. denied,* 439 U.S. 930. The state claims involved in the case at bar emanate from the *fact* of the Respondent's discharges. To fall within the "abusive and outrageous" standard set forth in *Farmer,* it would have to be determined that offering permanent replacement status during a labor strike, the legal character of which was unclear, and subsequently agreeing to recall the strikers as part of a Board-sanctioned collective bargaining agreement, constitutes conduct that no reasonable man in a civilized society could be expected to endure. It is submitted that the circumstances in this case simply do not represent outrageous conduct envisioned by this Court as sufficient to allow concurrent jurisdiction by the State and the resulting interference with the federal scheme. *See, Viestenz v. Fleming Companies, Inc.* _____, F.2d _____ - (10th Cir. 1982), 110 LRRM 2935.

The considerations that existed in *Linn* and *Farmer* which vitiated the normal grounds for preemption are not present in the case at bar. Unlike *Linn*, it cannot be contended that the subject matter involved in this dispute is of peripheral concern to the Act or involves issues which can be determined at the state level without infringing upon legitimate labor-related activities designed to be shielded by national labor policy from interference by the States. The instant case involves not only the freedom of employers to advertise for and hire permanent replacements during a labor strike, an economic resource designed to be left unregulated, but also involves state intrusion into the unfair labor practice jurisdiction of the Board as well as state interference with the Board's administration of the Act through the agency's efforts to settle unfair labor practice charges and aid in the peaceful and expeditious resolution of labor strikes. The concern expressed by the Court in *Linn* with the inability of federal labor law to provide a remedy for malicious libel is not a concern militating against preemption in this case. The Respondents have available administrative remedies under Sections 8(a)(1), 8(a)(3), 8(b)(1)(A) and 8(b)(2) of the Act, and, since the Union was under the affirmative obligation to represent their interests fairly and nondiscriminatorily during the strike settlement negotiations, the respondents also have the option of filing a law suit against the Union in federal or state court for breach of the duty of fair representation. *Vaca v. Sipes*, 386 U.S. 171 (1967).

Moreover, as the Court pointed out in *Farmer*, the danger of conflicting regulation of the same conduct is accentuated where the state court must resolve an underlying labor dispute in the course of adjudicating a state cause of action. In the instant case, the legality of the Respondent's layoffs under state law cannot be determined without first resolving the underlying federal issues concerning the status of the strike at the time the Respondents were hired as well as the effectiveness of the contract between the parties embodied in the strike settlement agreement. As discussed above, it is unclear whether the strike was an economic or an unfair labor practice strike, but if the strike was an unfair labor practice strike, the Respondents' layoffs would have been required in order to provide the strikers with their federal right to unconditional reinstatement.

In holding the Respondents' claims not preempted, the Kentucky Court of Appeals, while purporting to recognize that the Board has exclusive jurisdiction over the adjudication of unfair labor practices, first held that the subject matter of the dispute could only have involved an "arguable" violation of Section 8(a)(3) of the Act, and further decided that, since the Respondents were seeking full-time employment rather than membership in a labor organization, Section 8(a)(3) could not have been violated (J.A. 15-16). The Court further held that, as nonunion employees, the Respondents were not parties to the collective bargaining agreement, and then proceeded to rely on the test set forth in *Garmon* and *Linn* to hold the Respondents' claims not preempted by federal law. As stated by the Kentucky Court:

> The appellants were hired by the appellee with the promise that they would be permanent employees. As a result of the bargaining agreement entered into between the striking employees and the appellee, the appellants were forcibly laid off. Clearly, such action on the part of the appellee is a merely peripheral concern of the N.L.R.B. Conversely, the alleged behavior greatly involves local feeling and responsibility that should be subject to the jurisdiction of the state courts. (J.A. 17).

It is submitted that an analysis of the reasoning by the Kentucky Court of Appeals demonstrates the inherent danger of allowing state tribunals to adjudicate complex issues of federal labor law and policy which Congress intended either to be resolved by the Board or simply left unregulated. Initially, the Kentucky Court presumed that since the Respondents were not members of the Union, the remedial provisions of the Act were inapplicable to them. This is clearly incorrect. The Respondents' terminations gave rise not only to the arguable application of Section 8(a)(3) of the Act, but also to the application of Sections 8(a)(1), 8(b)(1)(A) and 8(b)(2) of the Act. The Court was also incorrect in assuming that the Respondents were not parties to the negotiated strike settlement agreement. As members of the bargaining unit, the Respondents were clearly parties to the collective bargaining agreement

negotiated by the exclusive bargaining representative of that unit and were subject to the terms and conditions of the negotiated agreement. *NLRB v. Allis-Chalmers Mfg. Co., supra.*

Moreover, in holding the state claims were of peripheral concern to the Board, the Court of Appeals made no discussion of the possible interference with national labor policy which could result if the Board's conciliatory efforts aimed at resolving industrial disputes could be thwarted by the application of state laws inconsistent with the terms of a Board-approved strike settlement agreement. Similarly, there was neither any discussion of the potential impact that these claims could have on the federally protected right of employers to hire permanent replacements during an economic strike, nor was there even a hint that the Court was cognizant of the fact that the term "permanent" replacement carries a particular federal meaning which could be substantially altered by allowing a state claim concerning the use of this term to stand. Finally, there was no mention made of the fact that the strike may have been an unfair labor practice strike in which case federal law would have required the Respondents' layoffs.

In holding that the subject matter of the state claims "greatly involves local feeling and responsibility", the Court of Appeals provided ample demonstration of how the unfettered exercise of this rationale to defeat preemption can be used to frustrate the purposes of the Act. Not only did the Court make an erroneous and incomplete analysis in balancing the complex federal interests against those of the State, there was no consideration given to the limitations this Court has placed on the type of conduct over which the States can assert the "state interest" rationale. Matters of overriding state concern have traditionally encompassed only violence, intimidation and other forms of outrageous conduct, and allowing a state claim by striker replacements laid off pursuant to the recall provision of a strike settlement agreement on the ground that they were hired as "permanent" replacements would grant the States an unrestricted license to declare all activities alleged to involve tortious conduct or breach of contract to be matters of "great

local concern." The preemption doctrine could thus be circumvented by the artful drafting of pleadings regardless of the potential conflict such claims could present to federal labor law and national labor policy.

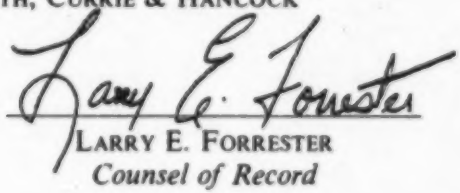
The state claims in this case do not involve a breach of the peace, the need to maintain public order, threats of violence, intimidation or any other form of outrageous conduct. These claims are not severable from the underlying labor controversy but are inextricably bound up in areas of labor relations which cannot be subjected to state interference, namely the right of employers to utilize the economic weapon of permanent replacements when faced with an economic strike or when the legal character of the strike is unclear, the ability of the Board to properly administer national labor policy both through its unfair labor practice jurisdiction and through its encouragement of strike settlements by means of the collective bargaining process and the pre-adjudication settlement of unfair labor practice charges, and the need to allow unfettered adherence to the terms of a duly negotiated collective bargaining agreement encouraged and supported by the Board and entered into between the employer and the certified bargaining representative of its employees.

CONCLUSION

Based on the foregoing arguments and upon the authorities cited, Belknap, Inc., the Petitioner herein, respectfully submits that the state claims of the Respondents, in accordance with the controlling decisions of this Court, must be held preempted by the operation of federal law.

Respectfully submitted,

SMITH, CURRIE & HANCOCK

By: 

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Respondent's Brief

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No. 81-1966

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

BELKNAP, INC. - - - - - - Petitioner

versus

DUWAINE E. HALE;
MICHAEL WINBURN;
JOSEPH JOHNSON, III;
MICHAEL SIMMONS;
MARK BAGSHAW;
JIM CARLISLE;
CHRIS JONES;
JOHN MARSHALL;
EUGENE BELL, III;
DAN J. STEMMLE;
GEORGE BOGGS; and
PAUL LOGSDON - - - - - - Respondents

On Writ of Certiorari to the Court of Appeals
of the Commonwealth of Kentucky

BRIEF OF RESPONDENTS

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& WEINER
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QUESTION PRESENTED

Whether the Courts of the State of Kentucky have the power to assume jurisdiction over the common law actions of fraud, misrepresentation and breach of contract where: the suit is brought against an employer by employees hired during a period of time the employers' regular employees were on strike.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-1966

BELKNAP, INC. - - - - - *Petitioner*

v.

DUWAINE E. HALE, et al. - - - *Respondents*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE COMMONWEALTH OF KENTUCKY

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

On February 1, 1978, approximately 400 Belknap employees represented by Teamsters Local 89, hereinafter called "Union" went on strike. Almost immediately, the Petitioner, for reasons known only to it, decided to hire other employees. The records show that before any employees were hired and before advertising for employees took place, Belknap was aware of the very real possibility that the striking union workers would be returned to their positions creating a surplus of employees necessitating some decision to be made in that regard. Despite this admitted fact, the Petitioner proceeded to perpetrate an almost unbelievable fraud upon the Louisville area public generally and the Re-

spondent workers here specifically, when it caused the following announcement to be published in the Louisville Courier Journal & Times, beginning February 5, 1978, and running daily through February 24, 1978;

> "Permanent employees wanted
> Belknap, Inc.
> 111 East Main Street
> Louisville, Kentucky
> OPENINGS AVAILABLE FOR QUALIFIED PERSONS LOOKING FOR EMPLOYMENT TO PERMANENTLY REPLACE STRIKING WAREHOUSE AND MAINTENANCE EMPLOYEES.
> EXCELLENT EARNINGS, FRINGE BENEFITS AND WORKING CONDITIONS WITH STEADY YEAR-ROUND EMPLOYMENT.
> MINIMUM STARTING RATE $4.55 PER HOUR. TOP RATE $5.85, DEPENDING ON SKILL, ABILITY AND EXPERIENCE, PLUS INCENTIVE EARNINGS OVER HOURLY RATE FOR MOST JOBS.
> APPLY IN PERSON AT THE BELKNAP OFFICE LOCATED AT 111 EAST MAIN STREET BETWEEN 9:00 A.M. AND 2:30 P.M. MONDAY THROUGH FRIDAY. PARK IN COMPANY LOT AT 1st AND MAIN.
> WE ARE AN EQUAL OPPORTUNITY EMPLOYER"

So alluring and deceiving was this advertisement that Harold Fields states in his deposition that a "tremendous" number of replacement applications was received shortly thereafter.

As each prospective non-union replacement was employed, Belknap made the following express individual, written representation and promise to each and every replacement:

> "I, the undersigned, acknowledge and agree that I as of this date have been employed by Belknap, Inc. at its Louisville, Kentucky facility as a regular full time permanent replacement to permanently replace _____ in the job classification of _____
>
> _____
>
> (Replacement Employees' Signature)"

See Respondent's Interrogatory No. 12 and Belknap's answers. Thus, a part of each replacement worker's individual contract included this promise on the part of Belknap not to replace the replacement worker with a striking union worker. After the entire Belknap work force had been replaced, negotiation with the Union continued. On April 4, 1978, apparently in order to dissuade the concerns of the replacements, Belknap further practiced its deception when the following letter was published:

> "April 4, 1978
>
> TO ALL PERMANENT REPLACEMENT EMPLOYEES
>
> Our Company has been and still is experiencing very traumatic times. The first strike in our 137 year history began February 1, 1978, and continues still. At that time, we made the decision to hire

permanent replacement employees so that we could continue to operate and serve our customers' needs. It was not an easy decision, but nevertheless a very necessary one.

We recognize that many of you continue to be concerned about your status as an employee. The Company's position on this matter has not changed nor do we expect it to change. You will continue to be permanent replacement employees so long as you conduct yourselves in accordance with the policies and practices that are in effect here at Belknap.

We have had a number of striking employees return to work. This is normal and in no way affects you or your job. They are simply filling vacancies that occur in the normal course of business.

There are many rumors and the vase majority of them are completely false. We ask your help in keeping false and misleading information to a minimum. Speak with your supervisor about any questions which you have. He will be glad to help you.

We continue to meet and negotiate in good faith with the Union. It is our hope and desire that a mutually acceptable agreement can be reached in the near future. However, we have made it clear to the Union that we have no intention of getting rid of the permanent replacement employees just in order to provide jobs for the replaced strikers if and when the Union calls off the strike.

Our overall productivity continues to increase and now is approaching normal in many areas. As you gain experience and familiarity with our total

operation, we are confident there will be continued improvement

Our customers have demonstrated great confidence in us by continuing to give us their business. We must do our very best in order to merit this confidence.

HAROLD FIELDS,
Director of Personnel"

Unfortunately, the fears of the replacement employees were realized. On July 17, 1978, Belknap settled the strike with the Union and agreed to recall the "permanently replaced" strikers at the minimum rate of 35 per month. In fact, they were recalled in numbers greatly exceeding the minimum requirement and the entire recall of the striking work force was completed during the months of July, 1978 through January, 1979. (This fact is verifiable in the various statistical data provided by Belknap in its Answers to Plaintiff's Interrogatories).

Roughly two months after Belknap began recalling the strikers it also began "laying off" the non-union replacement workers of which the class herein is comprised. Interestingly enough, Belknap completed the "layoffs" of the majority of replacements during the seven month period beginning September, 1978, through March, 1979. This was within two months of the time frame of the recall of union workers. Belknap admits (again, see Harold Fields deposition) that the recall directly caused some of the layoffs. However, it contends that any replacement laid off after the recall of

the Union was completed could not have been the result of the recall but rather due to a "slowdown" in business.

Those replacements "laid off" before all of the union workers had been recalled were notified of this fact by form letter providing no reason for the action. (See Exhibits to the Deposition of Harold Fields). Those replacements laid off after the recall of the union workers received a second form letter prepared by Belknap. This form letter, written after this suit had been filed attempted to establish a "slowdown in business" as the reason for the layoff.

Respondents' suits were filed in the Jefferson Circuit Court in early December, 1978, naming Belknap as the only defendant. Three basic theories are advanced herein. First of all, it has been clearly alleged in the complaint that Belknap had committed callous and aggravated fraud and misrepresentation for which it is liable in tort. Both compensatory and punitive damages are sought.

Secondly, it is alleged that binding individual employment contracts were effected between each replacement and Belknap both orally and in writing, to the effect that each replacement would not lose his or her job status on account of returning strikers. Respondents do not merely contend that they were hired as "permanent" employees, for this would not provide them with any protection since generally such employees are terminable at the will of the company if not protected by a collective bargaining agreement. The key in this case is that while the replacements were

not guaranteed that they would not be laid off for legitimate reasons such as a slow down in business, they were specifically advised that they would not lose their jobs on account of returning strikers.

The third theory of recovery advanced by Respondents involves quasi-contract principles. Respondents allege that each and every replacement has relied to his or her detriment on Belknap's representation that his or her security would not be interrupted by returning strikers. Clearly, the replacements have changed their positions in that they have either left other employment to work at Belknap or they have lost valuable seniority time that could have been accuring at other employment but for the wasted time spent in reliance on Belknap's false promises. In addition, all of the replacement workers incurred countless episodes of actual, physical and emotional violence as they crossed the picket lines to work at Belknap under the assumption that their positions were secure, long-ranged employment.

Following the filing of this suit in December, 1978, the Petitioner attempted removal of this action to the United States District Court for the Western District of Kentucky. That court sustained the Respondents' motion to remand the action to the state court, concluding that the action was based in state law upon tort and contract theory and thus, there was no substantial federal question involved, with an opinion and order which is more fully set out in Appendix A. No appeal was taken by Belknap from this final order.

The Jefferson Circuit Court, upon assuming jurisdiction following the sustaining of the motion to re-

mand by the United States District Court thereafter sustained a motion for summary judgment and in doing so, did not make findings of fact or conclusions of law setting forth the basis of its granting the motion. The essence of granting a motion for summary judgment under the Rules of Civil Procedure of the Commonwealth of Kentucky merely concludes that taking into account the status of the record at that time in its most favorable light for the plaintiffs, there has not been presented a justicable issue warranting submission to a jury or to the court setting at a bench trial (Joint Appendix 9a).

The decision granting summary judgment by the Jefferson Circuit Court was appealed to the Kentucky Court of Appeals. That court reversed, holding that the motion for summary judgment had been improperly sustained. The case was thus remanded to the trial court on April 24, 1981 (Joint Appendix 14a).

The Petitioner disagreed with this ruling and sought discretionary review from the Supreme Court of Kentucky. Simultaneous with the filing of the request for discretionary review, the National Labor Relations Board (hereinafter "NLRB") sought permission to intervene as amicus curiae. After the NLRB intervened as amicus curiae, the Supreme Court of Kentucky granted the request for discretionary review, oral arguments were heard, and the court decided that the Court of Appeals' decision was proper and disposed of the matter with an order stating that discretionary review had been improvidently granted (Joint Appendix 20a).

THE RESPONDENTS' CLAIMS AGAINST THE EMPLOYER ARE WITHIN THE WELL RECOGNIZED EXCEPTIONS TO THE PRE-EMPTION DOCTRINE.

In *Farmer* v. *United Brotherhood of Carpenters Local 25,* 430 U. S. 290, 296-297 (1977), this court noted certain limits to the Pre-emption Doctrine. The court stated (ibid) that the Rules of Pre-emption usually applicable in labor cases have not been applied where the activity in question "was a merely peripheral concern" of the Federal Labor Laws or "touched interest so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction [the court] could not infer that congress had deprived the states of the power to act." The court added (Id. at 297; Citation omitted) that the Pre-emption Doctrine had not been applied "where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interest promoted by the Federal Labor Statutes."

In *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959), this court in holding that the NLRB has exclusive jurisdiction in a case in which the conduct is in question is "arguably" subject to Section 7 or 8 of the National Labor Relations Act set forth this very significant language:

> "However, due regard for the presuppositions of our embracing federal system, including the prin-

> ciple of defusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the states of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act."

Perhaps the leading case and most succinct pronouncement by this court is *Linn* v. *United Plant Guard Workers,* 383 U. S. 53, 15 L. Ed. 2d 582, 86 S. Ct. 657 (1966) in which the following principles were pronounced:

> ". . . State remedies have been designed to compensate the victim and enable him to vindicate his reputation. The Board's lack of concern with the 'personal' injury caused by malicious libel, together with its inability to provide redress to the maligned parties, vitiates the ordinary argument for pre-emption."
>
> * * * * * *
>
> "Judicial condemnation of the alleged attack on Linn's character would reflect no judgment upon the objectives of the union. It would not interfere with the Board's jurisdiction over the merits of the labor controversy."

The court in *Linn* stressed the fact that the principles expressed in *Garmon* were predicated on the consideration in part that the Board had already evaluated and dismissed the charges filed pursuant to the applicable provisions of the Act. A like situation exists here in that the defrauded respondents have appealed

to the NLRB and the Board has refused to act. In the *Linn* case it was noted that under the specific situation presented by the case the Board was powerless to provide any means by which redress of the malicious libel could be sought. As in the *Linn* case the Board would also be powerless here to award damages, impose a penalty or give any other relief to the defrauded individuals, especially it could not administer the principles of punitive damages as a deterrent to others who would attempt to defraud the citizenry of the Commonwealth of Kentucky.

The action complained of in the *Linn* case was libel, an assassination upon the reputation of an individual. In the present case the action complained of was a fraudulent inducement of 400 ordinary working people to change their employment situation to their detriment. Many of the employees who accepted Belknap's invitation left higher paying jobs for the prospect of more continuous or non-seasonable or permanent employment. Many others left jobs of comparable earning ability for the brighter misrepresented prospect of steady year-round employment to their detriment. Surely, the injury and the harm sustained by the respondents by way of loss of income and reduction to the welfare ranks is more torturous to them and of greater compelling state interest at a time when the state's concern over the economy, employment, taxes, jobs and welfare concerns are at an all-time high transcend any jealousy the NLRB might have in broadening its area of influence.

STATE JURISDICTION OVER THE RESPONDENTS' CLAIMS WOULD IN NO WISE INTERFERE WITH CONGRESSIONAL INTENT OR THE ADMINISTRATION OF THE NATIONAL LABOR RELATIONS ACT.

Great and thoughtful arguments have been made by the various parties supporting the petitioner around the proposition that if state claims involved in the case at bar are held not pre-empted that this would have the potential of disrupting the conciliation and settlement processes necessary to insure effective administration of the policies of the National Labor Relations Act by the Board. Boiled down to its essence all of the arguments presented eventually focus on the theory that employers must be allowed to hire replacement employees during a strike in order to achieve a balance of power between the warring factions.

No assertion has been made nor will be made that an employer does not have the right to hire employees during an economic strike. What is being said or asserted is that if an employer does elect to advertise, offer inducements or enter into either verbal or written contracts with prospective employees, that same employer must not misrepresent the terms or conditions of that employment. If that employer does, in fact, do so, it is only right and fitting that the employer bear such reasonable consequences as are necessary to insure that it affords redress to the complaining party for the wrong which has been effected. It is not unreasonable to expect that the citizens of any state be responsible for its wrongful actions. To carve out ex-

ceptions to this principle under the veil of protection creates an injustice for which there would be no redress.

When a strike incurs, an employer is immediately aware of several courses of action and consequences.

1. The employer may hire employees to continue to run the business.

2. If it is a purely economic strike, the employer may retain those employees to the exclusion of the strikers or he may elect not to do so.

3. If it is an unfair labor practice strike, the employer may find himself in the position of being required to take the strikers under certain circumstances and therefore find himself with a duplication of employees and may elect to discharge the replacements as an economic factor.

4. The employer and the Union may elect to enter into a settlement agreement which embody any or all of the above.

A state court's assumption of jurisdiction over the complaint in this case in no wise effects the employer's ability to do any of the above actions. The state's assumption of jurisdiction in the instant action merely asserts a claim that the employer in whatever action it elects to take must not make a fraudulent misrepresentation. It is that simple. The action complained of is not that the strikers were reinstated. That is a perrogative of the union and the employer in settling its affairs. There is no claim here that the employer

was not exercising a right afforded by the Act in the interest of balancing the economic weapons available to labor disputes. The only claim that is being made is that if the employer does give out invitations of employment, it must not misrepresent the terms and conditions of that employment to the general public at large and in this respect the Commonwealth of Kentucky has a compelling state interest. In effect, all briefs presented by the various parties supporting the petitioner ultimately wind up their arguments with the assertion that "if an employer were to extend only such a conditional offer its ability to hire replacement workers quickly would be diminished and its chief weapon for combating the employees strike pressure would consequently be weakened." (Brief for National Labor Relations Board, p. 17) If a fraudulent misrepresentation is necessary to strike a balance of power between the combatants then something is wrong with the administration of the Act.

MUCH HAS BEEN SAID CONCERNING THE ISSUE HAVING BEEN SETTLED AND PRE-EMPTED BY THE AGREEMENT IN THIS CASE ENTERED INTO BETWEEN BELKNAP AND LOCAL UNION 89 BASED PRIMARILY ON THE ASSERTION THAT THE TEAMSTERS LOCAL No. 89 WAS THE EXCLUSIVE BARGAINING REPRESENTATIVE FOR BOTH THE STRIKING EMPLOYEES AND THE RESPONDENTS.

We certainly do not agree with the argument that the replacements are bound by the terms of the strike agreement because the union was acting as their repre-

sentative as well as that of the strikers. This proposition is entirely illogical inasmuch as there exists a conflict of interest which the union cannot ethically serve. Further support in this regard is found in the case of Sartorious and Co., Inc. (United Mine Workers District 50, Local 12090), 10 NLRB 493, the paramount issue was whether the permanent strike replacements, the strikers, or both groups were to be permitted to vote in an NLRB decertification election conducted during a strike. In that case the judgment was that the strikers alone were eligible to vote.

THE PETITIONER'S FAILURE TO APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT REMANDING THE CASE TO STATE COURT NOW BARS THE PETITIONER FROM RAISING THE PRE-EMPTION ISSUE.

As previously indicated while the subject action of this case was pending in the Jefferson Circuit Court, Commonwealth of Kentucky, this case was removed to the United States District Court for the Western District of Kentucky asserting the court's jurisdiction of the National Labor Relations Act, Title 29, U.S.C. Section 158(d). That court sustained a motion to remand back to state court with the following language:

> "Title 29 U.S.C. Section 158(d), under which this court's jurisdiction is invoked deals with the obligation of parties to bargain collectivley. Were this a dispute between the defendant and Local 89 that statute would have some efficacy. It is not such a dispute. The action is a common law action

> for tortuous interference with an alleged contract between the defendant and certain individuals who were not parties to the collective bargaining agreement between defendant and local 89. This court has not concurrent original jurisdictional of the dispute since no diversity exists."

The foregoing was a final appealable order from which no appeal was taken and because of that failure it is the law of the case between the parties and should not be subject to further appeal. (Appendix A).

CONCLUSION

The complaint which is the subject matter of this action is based upon an alleged tortuous violation of the rights of the respondents for which the state law affords a remedy for the recovery of both actual and punitive damages. The tortuous conduct is of compelling state interest effecting the public welfare and security of its citizens and the state remedy is not excluded by the National Labor Relations Act.

The prosecution of the present action for damages causes no conflict with federal jurisdiction. The National Labor Relations Act affords no remedy to the respondents for the wrongs done them nor does the complaint seek to regulate future labor relations between the parties. It is a common law action in tort for damages allegedly sustained by the fraudulent misrepresentation in newspaper advertising and agreements made with the respondents by the petitioner.

The National Labor Relations Board cannot award damages for the wrong done and if the National Labor Relations Act has the effect contended by the petitioner, then it becomes a shield for the tortuous conduct alleged instead of a remedy.

The employer and the union cannot unilaterally commit themselves to binding agreements which affect common law claims of the respondents arising out of circumstances and conditions totally unrelated to the labor dispute between those principles.

The judgment of the Court of Appeals of the Commonwealth of Kentucky should be affirmed.

Respectfully submitted,

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By: _____

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APPENDIX A

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

STEPHEN WERNERT, Individually and as Representative of a Class of Individuals - - - - - - - - - *Plaintiff*

v. **No. C 79-0016-L(B)**

BELKNAP, INC. - - - - - - - - *Defendant*

AND

DUAINE E. HALE, Et Al. - - - - - *Plaintiffs*

v. **No. C 79-0013-L(B)**

BELKNAP, INC. - - - - - - - *Defendant*

ORDER—Entered March 21, 1979

For the reasons set forth in the Memorandum filed this day,

IT IS ORDERED that these action be, and they hereby are, remanded to the Jefferson Circuit Court for further proceedings. It is further ORDERED that the Clerk is directed to send a certified copy of this Order to Paulie Miller, Clerk, Jefferson Circuit Court.

This 21st day of March, 1979.

(s) Thomas A. Ballantine, Jr.
United States District Judge

Copies to:

Counsel of record

MEMORANDUM—Entered March 21, 1979

This matter is before the Court on the motions of the plaintiffs to remand these actions to the Jefferson Circuit Court from which they were removed and on the motion of the defendant for summary judgment. In view of our decision on the motion to remand, we need not consider the motion for summary judgment.

These actions were commenced in the Jefferson Circuit Court by certain persons who were hired by defendant as "permanent" replacement employees during a protracted strike by Local 89 of the Teamsters Union. The gravamen of plaintiffs' complaints is that they were induced to accept employment at defendant's plant and that defendant thereafter tortiously breached its contract of employment with plaintiffs by discharging them and replacing them with former striking employees. The discharge and replacement of the plaintiffs was a part of the settlement agreement between defendant and Local 89.

Defendant removed the actions to the United States District Court for the Western District of Kentucky asserting the Court's jurisdiction under the National Labor Relations Act and, specifically, Title 29, United States Code, Section 158(d).

At the outset, we point out that there is a duty resting on this Court to notice and determine the existence of a federal question. This is true even if the motion to remand is not made. *Jones* v. *General Tire & Rubber Co.*, 541 F. 2d 660 (7th Cir. 1976). The burden is on the party seeking to preserve the removal to show that the requirements for removal have been met. *See 14 Wright, Miller & Cooper, Federal Practice and Procedure,* Section 3739 at page 758. When the defect in removal does not go to the jurisdiction of the Court it may be waived as when there is concurrent original jurisdiction. *Stokes* v. *Merrill Lynch, Pierce,*

Fenner & Smith, 523 F. 2d 433 (6th Cir. 1975). Remand may be ordered only when the removal is improvident and the court lacks jurisdiction. *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U. S. 336, 96 S. Ct. 584 (1976).

Title 29 U.S.C. Section 158(d), under which this Court's jurisdiction is invoked, deals with the obligation of parties to bargain collectively. Were this a dispute between defendant and Local 89, that statute would have some efficacy. It is not such a dispute. The action is a common law action for tortious interference with an alleged contract between defendant and certain individuals who were not parties to the collective bargaining agreement between defendant and Local 89. This Court has no concurrent original jurisdiction of the dispute since no diversity exists.

We believe the following language from *Jones* v. *General Tire & Rubber Co., supra*, has particular application here:

> "Removal is proper where the real nature of the claim asserted in the complaint is federal, whether or not so characterized by the plaintiff. *Beacon Moving & Storage, Inc.* v. *Local 814, International Brotherhood of Teamsters*, 362 F. Supp. 442, 445 (S.D.N.Y. 1972). Nonetheless, the plaintiff has the perogative of determining the theory of his action and, so long as fraud is not involved, he may defeat removal to the federal courts by avoiding allegations which provide a basis for the assertion of federal jurisdiction. *J. Landowne Co.* v. *Paper Box Makers and Paper Specialties Union, Local 299*, 278 F. Supp. 339, 340 (E.D.N.Y. 1967).
>
> There was no basis upon which the district court could conclude that the plaintiff was employing artful manipulation of the terms of the complaint in order to defeat removal. *Cf. Hearst Corp.* v. *Shopping Center Network, Inc.*, 307 F. Supp. 551, 556 (S.D.N.Y. 1969).

Because the plaintiff's complaint omitted important allegations and did not purport to ground a claim on § 301(a), the defendant bore the burden of establishing the jurisdiction of the district court. It is well established that the burden is on the party seeking to remove to establish his right and the case should be remanded if there is doubt as to the right of removal in the first instance." 541 F. 2d at 664.

"Reduced to its basic elements, the plaintiff here is merely claiming a right of action based upon state and common law theories of breach of contract. Whether the plaintiff can establish this claim is not before us, and should not have been before the district court, because the claim in no manner hinged upon a violation of a contract between the plaintiff's employer or its labor organization. While we are not pleased with the prospect of sending a claim of dubious merits back for further litigation, we are of the opinion that the plaintiff is entitled to have the determination of the merits of his case made in the forum originally selected by him. The defendant is deprived of no valuable right, for as Judge Hutchinson observed in remanding a case, as he understood the jurisprudence of the state in which he was sitting, it 'operates with an eye to justice, just the same as that of the federal court.' *Pabst v. Roxanna Petroleum Co.*, 30 F. 2d 953, 954 (S.D. Tex. 1929)." 541 F. 2d at 665.

The similarity of the factual situation in these cases to that in *Jones* compels the Court to observe that the Jefferson Circuit Court operates with the same eye to justice as we do.

Plaintiffs' motions to remand will be granted and the Clerk will be directed to mail a certified copy of the order

of remand to Paulie Miller, Clerk of the Jefferson Circuit Court. 28 U.S.C. Section 1447(c).

An appropriate Order has been entered this 21st day of March, 1979.

(s) Thomas A. Ballantine, Jr.
United States District Judge

Copies to:

Counsel of record

Amicus Brief

1

MOTION FILED
SEP 3 1982

No. 81-1966

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

BELKNAP, INC.
Petitioner,
v.
DUWAINE E. HALE, ET AL.,
Respondents.

On Writ of Certiorari to the Supreme Court of Kentucky

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1966

BELKNAP, INC.

Petitioner,

v.

DUWAINE E. HALE, ET AL.,

Respondents.

On Writ of Certiorari to the Supreme Court of Kentucky

MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby moves for leave to file the accompanying brief *amicus curiae* in support of the position of the petitioner in the instant case.

The AFL-CIO is a federation of 99 national and international unions with a total membership of approximately 14,000,000 working men and women.

The instant case, as we show in the accompanying brief *amicus curiae*, involves the transcending neutral principle that the use of economic weapons—by labor and, we readily concede, by management as well—during labor-management disputes affecting commerce is a field over which Congress has exercised control to the exclusion of local regulation. That principle is at the heart of the federal labor law, not as the Kentucky courts supposed, at its "periphery" and for that reason controls. It is because the state courts reached the opposite conclusion that the AFL-CIO seeks to present its views to this Court.

In our brief *amicus curiae* we show that the preemption principle stated above is firmly established by this Court's decisions. We then show that this principle precludes the states from granting relief—under either of the theories advanced below—to the plaintiffs-strike replacements against their former employer. If such relief were granted the interference with the collective bargaining process established in the National Labor Relations Act, as amended, 29 U.S.C. § 141 *et seq.*, would be serious and substantial and would in the long run adversely affect all of the participants in that process.

CONCLUSION

For the above-stated reasons, this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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BELKNAP, INC.

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DUWAINE E. HALE, ET AL.,

Respondents.

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the AFL-CIO is set forth in that motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

Viewing this falling out between an employer and individuals who had been allied with the employer in combatting a strike, and noticing immediately that the sole apparent effect of the decision below is to penalize an employer who hired permanent strike replacements, our instinctive reaction is to say, "a plague o'both your houses."

But a moment's reflection makes clear that precisely because the former alliance between the parties to this suit was forged in response to a strike and is at the heart of this controversy, the instant case involves the transcending neutral principle that the use of economic weapons—by labor and, we readily concede, by management as well—during labor-management disputes affecting commerce is a field over which Congress has exercised control to the exclusion of local regulation. *E.g.*, *Teamsters Union v. Morton*, 377 U.S. 252; *Machinists* v. *Wisconsin Emp. Rel. Comm'n*, 427 U.S. 132. This principle is firmly established by this Court's decisions, as we show in our argument. We then show that this principle precludes the states from granting relief—under either of the theories advanced below—to the plaintiff-strike replacements against their former employer. This is not because the later is relatively more worthy than the former—we are, as stated at the outset, agnostic in this regard—but because, however the controversy between these parties might be resolved, the interference with the collective bargaining process established in the National Labor Relations Act, as amended, 29 U.S.C. § 141 *et seq.*, would be serious and substantial and would in the long run adversely affect all of the participants in that process.

ARGUMENT

1. In *Machinists* v. *Wisconsin Emp. Rel. Comm'n.*, 427 U.S. 132 (*"Machinists"*) this Court delineated two lines of analysis for determining whether state authority to regulate labor management relations is preempted by federal law. The first, "based predominantly on the primary jurisdiction of the [National Labor Relations] Board * * * was developed in *San Diego Unions* v. *Garmon* [359 U.S. 236]." (*Machinists*, 427 U.S. at 138). The "second line of preemption analysis has been developed in cases focusing upon the crucial inquiry whether Congress intended that the conduct involved be unregulated because left 'to be controlled by the free play of economic

forces.' *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 144 (1971)." (*Machinists*, 427 U.S. at 140.)

The assertion of jurisdiction by the Kentucky courts over the plaintiffs-strike replacements' claim is, in our view, precluded by the *Garmon* rule. See p. 12 n.4 *infra*. But, we believe that here, as in *Machinists*, the most direct demonstration that state authority is preempted by the federal labor law is that recognition of the state law claim would "upset the balance of power between labor and management expressed in our national labor policy." (*Teamsters Union* v. *Morton*, 377 U.S. 252, 260 quoted in *Machinists*, 427 U.S. at 146).

2. The leading case in the "second line of preemption analysis" is *Teamsters Union* v. *Morton*, *supra*. *Machinists* explicated *Morton* as follows:

> * * * [*Morton*] held pre-empted the application of state law to award damages for peaceful union secondary picketing. * * * Central to *Morton's* analysis was the observation that "[i]n selecting which forms of economic pressure should be prohibited . . . , Congress struck the 'balance . . . between the uncontrolled power of management and labor to further their respective interests,'" [377 U.S.] at 258-259 * * *.
>
> "This weapon of self-help, permitted by federal law, formed an integral part of the petitioner's effort to achieve its bargaining goals during negotiations with the respondent. Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community . . . . If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted § 303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to

> upset the balance of power between labor and management expressed in our national labor policy * * *." [427 U.S. at 145-146.]

And the *Machinists* Court made plain too that the *Morton* rule applies not only to union and employee activity, but to employer activity as well:

> Although many of our past decisions concerning conduct left by Congress to the free play of economic forces address the question in the context of union and employee activities, self-help is of course also the prerogative of the employer because he, too, may properly employ economic weapons Congress meant to be unregulable.
>
> * * *
>
> "[R]esort to economic weapons should more peaceful measures not avail" is the right of the employer as well as the employee, *American Ship Bldg. Co. v. NLRB*, 380 U.S. [300] 317, and the State may not prohibit the use of such weapons or "add to an employer's federal legal obligations in collective bargaining" any more than in the case of employees. Cox, [*Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337] 1365. See, e.g., *Beasley v. Food Fair of North Carolina*, 416 U.S. 653 (1974). Whether self-help economic activities are employed by employer or union, the crucial inquiry regarding preemption is the same: whether "the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act' processes." *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. [369] at 380. [427 U.S. at 147-148, footnote omitted.]

The employer will doubtless argue in his brief, as he has argued in the petition for *certiorari*, that recognition of the plaintiffs-strike replacements claims would interfere with the employer's use of economic weapons. But it is equally true—and should not be overlooked—that recognition of such claims would also undermine the right

to strike by increasing the strikers' risk of losing their jobs. The plaintiffs-strike replacements allege that the employer's wrong was discharging the strike replacements in order to reinstate the strikers. While an award of damages here would not, presumably, affect the job tenure of the particular strikers in this case, it would discourage other employers who in the heat of economic battle opt to hire permanent replacements from agreeing to reinstate the strikers to settle the strike. (Indeed, "discourage" may be too mild a word. At least at first blush, it is difficult to understand why, if the state courts have the authority to provide damages to strike-replacements in cases such as this, those courts would not also have the authority to issue injunctive relief in favor of strike replacements.) The effects of the decision below both on employers and on striking employees compel the conclusion that recognition of the state claim asserted here would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Machinists*, 427 U.S. at 157, citing cases).

3. "Collective bargaining, with the right to strike at its core, is the essence of the federal scheme." (*Bus Employees* v. *Missouri*, 374 U.S. 74, 82). Not surprisingly, the federal labor law spells out a complex of rules delineating the disputants' rights, duties and privileges while economic warfare is being waged. And, because the use of economic weapons is not an end in itself but a means to a higher end—achieving industrial peace—the NLRA focuses too on the rules governing the cessation of hostilities.

For present purposes, the most basic of these rules is that spelled out in *NLRB* v. *Fleetwod Trailer Co.*, 389 U.S. 375, 378:

> Section 2(3) of the Act (61 Stat. 137, 29 U. S. C. § 152(3)) provides that an individual whose work has ceased as a consequence of a labor dispute continues to be an employee if he has not obtained

> regular and substantially equivalent employment. If, after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by §§ 7 and 13 of the Act (61 Stat. 140 and 151, 29 U. S. C. §§ 157 and 163). Under §§ 8(a)(1) and (3) (29 U.S.C. §§ 158(1) and (3)) it is an unfair labor practice to interfere with the exercise of these rights. Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to "legitimate and substantial business justifications," he is guilty of an unfair labor practice. *NLRB* v. *Great Dane Trailers*, 388 U.S. 26, 34 (1967). The burden of proving justification is on the employer. *Ibid.*

Notwithstanding the protection afforded the right to strike, from the earliest days of the Act it has been settled that an employer has the right under federal law to "resort to the economic weapon" of continuing his business by hiring permanent strike replacements:

> There is no evidence and no finding that the respondent was guilty of any unfair labor practice in connection with the negotiations in New York. On the contrary, it affirmatively appears that the respondent was negotiating with the authorized representatives of the union. Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on the business. Although § 13 provides, "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike," it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to

> reinstate only so many of the strikers as there were vacant places to be filled. [*Labor Board v. Mackay Co.*, 304 U.S. 333, 345-346, footnote omitted.]

But because "the burden of proving justification [for not reinstating the strikers] is on the employer" (*Fleetwood Trailer*, 389 U.S. at 378), the employer must show that "the jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations" (*id.* at 379). Thus, to qualify for *Mackay's* protection the employer must prove that the employees who are retained "actually replaced strikers in the jobs previously held by corresponding individual strikers." (*Machinists District 8* v. *Clark Co.*, 471 F.2d 694, 698 (C.A. 7).) An employer who retains a mere temporary replacement or an employee transferred to the striker's job pursuant to a "makeshift" arrangement violates §§ 8(a)(1)&(3) of the Act. (*Firth Carpet Co.* v. *National Labor Relations Board*, 129 F.2d 633, 636 (C.A. 2).) [1]

It is implicit in *Mackay* and explicit in the lower court decisions approved in *Mastro Plastics Corp.* v. *Labor Board*, 350 U.S. 270, 278 & n.9, that the employer's privilege to hire permanent replacements and deny reinstatement to strikers is available only in an "economic" strike. Where the strike is called to protest the employer's unfair labor practices the strikers have the status under the Act of "unfair labor practice strikers" who "are ordinarily entitled to reinstatement even if the employer has hired permanent replacements". *Fleetwood Trailer*, 389 U.S. at 379, n.5.

Likewise, if an economic strike is converted into an unfair labor practice strike by the employer's illegal conduct during its course those strikers who had not been

---

[1] It is undoubtedly to meet these preconditions to obtaining *Mackay's* protections that the employer caused the strike replacements to fill out the form reproduced at p. 4 of the brief in opposition to the petition for *certiorari* in this case.

previously replaced at the time of conversion also enjoy the status of "unfair labor practice strikers" and are entitled to reinstatement upon application. (See, *e.g.*, *NLRB* v. *Pecheur Lozenge Co.*, 209 F.2d 393, 404-405 (C.A. 2), *cert. den.*, 347 U.S. 953, and cases cited *id.*)[2]

While if the strike is an economic strike throughout, the employer is "not bound to displace men hired to take the strikers' places in order to provide positions for them" (*Mackay*, 304 U.S. at 347), it has been settled from the first that the employer is no more "bound" to retain men hired to take the strikers' places than he is bound to displace those men. As the Board explained just six months after this Court's *Mackay* decision:

> By preserving to employees who go on strike their status as employees and the rights guaranteed by the Act, the Act contemplates that during the cur-

---

[2] Under the Wagner Act "the Court and the Board fashioned the doctrine that the Board should deny reinstatement to strikers who engaged in strikes which were conducted in an unlawful manner or for an unlawful objective." (*Labor Board v. Drivers Local Union*, 362 U.S. 274, 281). These "limitations or qualifications" on the right to strike were preserved in § 13 of the Taft-Hartley amendments. However, where, in order to settle the strike, or for other reasons, the employer condones the prior unlawful actions of the striking employees, they are entitled to reinstatement on the same terms as if they had been engaged in protected activity:

"After a condonation the employer may not rely upon prior unprotected activities of employees to deny reinstatement to, or otherwise to discriminate against, them." *Confectionery & Tobacco Drivers & Ware. U. v. NLRB*, 312 F.2d 108, 113 (C.A. 2) (citing cases). The condonation principle "reflect[s] a clear public interest in the prompt settlement of labor disputes * * *" (*id.*). Thus, if there were a case in which an employer had decided to reinstate strikers although they had lost their statutory rights, a state court judgment in favor of replacements would interfere with settlement of the strike and would be inconsistent with federal policy.

The same policy would, of course, be undermined by awarding damages against an employer for settling a strike by reinstating strikers who were engaged in a protected strike, and discharging their replacements.

> rency of a strike, the employer and the striking employees may settle the strike, with the striking employees returning to their former jobs, displacing individuals hired to fill those jobs during the strike. Strikes are commonly settled in this manner. The hold of individuals who, during the currency of a strike, occupy positions vacated by striking employees is notably tenuous. [*Sartorious & Co., Inc. (United Mine Workers District 50, Local 12090)*, 10 NLRB 493, 494-495 footnote omitted.[3]

Strikes continue to be "settled in this manner." In *Retail Clerks v. Lion Dry Goods*, 369 U.S. 17, 28 the Court recognized that a strike settlement agreement is an

> agreement between employers and labor organizations significant to the maintenance of labor peace between them. It [is] a means satisfactory to both sides for terminating a protracted strike and labor dispute. Its terms affect the working conditions of the [employer's] employees * * *. It affect[s] the end of picketing and resort by the labor organizations to other economic weapons, and restore[s] strikers to their jobs. It resolve[s] a controversy arising

---

[3] The immediate issue in *Sartorious* was whether the permanent strike replacements, the strikers, or both groups are permitted to vote in an NLRB decertification election conducted during a strike. That question has received a succession of answers. In *Sartorious* the answer was the strikers alone are eligible to vote. In *Rudolph Wurlitzer Company (Piano, Etc. Workers Union)*, 32 NLRB 163, the answer was both strikers and the permanent strike replacement are eligible to vote. Under § 9(c)(3) of the NLRA as amended by the Labor Management Relations Act of 1947, the answer was that only the permanent strike replacements are eligible to vote. And, under § 9(c)(3) of the NLRA as amended by the Labor-Management Reporting and Disclosure Act of 1959, the answer is that during the replacements are entitled to vote. These changing eligibility rules do not affect the question presented here. Sections 2(3), 8(a)(1) & (3), & 13 have remained unchanged in any pertinent respect. And it is those provisions that determine the rights, duties and privileges of employers and unions in prosecuting and setting economic contests.

> out of, and importantly and directly affecting, the employment relationship.

Even when entered into between an employer and a striking union that has lost its status as an exclusive bargaining representative (as in *Retail Clerks*), a strike settlement agreement furthers the purposes of the Act. *A fortiori* that is true where such an agreement is reached between an employer and a striking union that has retained that status. Indeed, in that context the law is that it is a "legitimate bargaining demand" for the union to seek "to get all the strikers back to work in preference to the replacements" (*Portland Stereotypers' Etc. Union, No. 48 (Journal Publishing Co.)*, 137 NLRB 782, 786 & n.6), and the employer, of course, has an obligation, imposed by § 8(a)(5) of the Act, to respond to such a demand by bargaining in good faith.

4. The sum of the matter is that the term "permanent strike replacement" in the federal labor law is one of art. Consistent with § 10(c) of the Act, the "permanent strike replacement's" job rights are *inferior* to those of unfair labor practice strikers. And, consistent with § 2(3) of the Act—whose purpose is to preserve the employee status of individuals on strike—the "permanent strike replacements'" job rights are in *no way superior* to those of economic strikers; in concluding an economic strike, the employer is not bound to displace or to retain the "permanent strike replacements."

Where a strike is determined to be an unfair labor practice strike, or when the employer decides to enter into a strike settlement agreement with the union by providing for reinstatement of the strikers, as Judge Learned Hand said, "It is of course true that the consequences are harsh to those who have taken the strikers' places; strikes are always harsh * * *." (*National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F.2d 862, 871 (C.A. 2) cert. denied 304 U.S. 576.) But as *Machinists* teaches, it is not the province of the state courts to substi-

tute a gentler system of industrial relations of their own making. "[T]he economic weakness of the affected party cannot justify state aid contrary to federal law for, as we have developed, 'the use of economic pressure by the parties to a labor dispute is not a grudging exception [under] . . . the [federal] Act; it is part and parcel of the process of collective bargaining.' *Insurance Agents*, 361 U.S. at 495." (*Machinists*, 427 U.S. at 149.) Permanent strike replacements make common cause with the struck employer; for the purposes of the federal labor law those replacements and their employer must be considered a single "party" to the labor dispute.

The object of the instant lawsuit is to use state law as a lever to improve the strike replacements' legal position fixed by the federal labor law at the expense of the employer, the union and the strikers. If the strike replacements prevail here, employers, to avoid potentially ruinous damage awards, will either not hire permanent strike replacements or if such replacements are hired not sign strike settlement agreements providing for the reinstatement of the strikers. Where the former occurs, the employer is plainly deprived of a powerful economic weapon. On analysis, the alternative result is equally destructive for the struck employer, the striking union and the strikers.

Terming an employer's decisions to conclude a strike settlement agreement by providing for the reinstatement of the strikers an "economic weapon" may perhaps have a paradoxical sound. But the ability to maneuver so as to adapt to changing circumstances is as much of the essence in economic warfare as in any other form of combat. A combatant who is bound by rigid rules to defend an untenable position may not live to fight another day; signing a truce at the propitious moment may be the precondition to survival and to future victories. For state law to more narrowly restrict the terms on which an employer may settle a strike than federal law is therefore

most certainly to impermissibly restrict the struck employer's economic weapons. The effect of such a state law on the striking union and on the strikers is at least as severe. Once permanent strike replacements are hired the strike can only end with the destruction of the employer or the loss of the strikers' jobs.[4]

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[4] As we have developed in the text, under the NLRA it is unlawful for an employer to refuse to reinstate the strikers if the strike is an unfair labor practice strike from the beginning or is converted into such a strike before the strikers were permanently replaced. Thus, in a case such as this where it is alleged that the employer committed an unfair labor practice that caused or prolonged the strike, an employer refusal to reinstate the strikers is arguably an unfair labor practice and the state courts lack jurisdiction over the claim under the *Garmon* line of analysis as well. Since the legality of the refusal to reinstate depends on a determination whether the strike was an unfair labor practice strike, as to which the Board also has exclusive primary jurisdiction, application of the *Garmon* doctrine is particularly fitting. It is therefore unnecessary —even if *Garmon* rather than *Morton* is followed—to pursue the more questionable theory of a potential 8(a)(1) violation discussed at pp. 8-10 of the NLRB's *amicus curiae* brief in support of the petition for certiorari.

We do not agree with the Board's argument that the replacements are bound by the terms of the strike settlement agreement because the union was acting as their representative as well as that of the strikers. The Board's analysis proceeds from an erroneous view of collective bargaining as it pertains to the narrow but important questions of the conduct of the strike and the resumption of normal relations in concluding a strike.

At p. 9 of the foregoing brief the Board refers to *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 and draws therefrom the proposition that since the replacements are part of the bargaining unit the union is their statutory representative as well as the representative of the strikers. This proposition is sound insofar as the union is bargaining about the terms and conditions of employment for the work force—however constituted—after the termination of the strike. (For example, the union could not bargain for a contract whereby strikers but not replacements will receive a five cents an hour wage increase or that strikers will be afforded superseniority vis-a-vis replacements. (Cf. *Labor Board v. Erie Resistor Corp.*, 373 U.S. 221.)) The result is compelled by the anti-discrimination principle of §§ 8(b)(1)(A) and 8(b)(2) of the Act;

5. The Kentucky Court of Appeals dismissed the employer's preemption submission in a single paragraph. (Pet. App. C, p.3.) That court relied on the portion of *Linn* v. *Plant Guard Workers*, 383 U.S. 53, 59, which quoted with approval from *San Diego Union* v. *Garmon*, 359 U.S. 236, 243-244:

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it does ont depend on the duty of fair representation. Indeed, we think it would be reasonable but for the Congressional judgment embodied in those provisions for the union to seek to prefer those whose exercise of the strike weapon has made it possible to achieve any gains at all in wages or other working conditions, over those who aided the employer in resisting such changes.

But the reasoning just outlined does not extend to the strike settlement agreement context. If it did—*viz.* if the union represented the strike replacements for all purposes—the employer and the replacements could not lawfully enter into individual contracts governing their hire and their terms and conditions *during the strike*. This necessarily follows from *J.I. Case Co. v. Labor Board*, 321 U.S. 332, which the Board also cites in this connection (p. 9). Thus, the logic of the Board's analysis would invalidate the individual contracts on which the plaintiffs-strike replacements rely without the need to even consider the effect of the strike settlement agreement on those replacements. In light of this defect, we suggest that this secondary argument put forward by the Board should not be reached.

The Board's suggestion at p. 9, n.6 of that Brief that the union "accommodated" the replacements in negotiating the strike settlement agreement appears to us to be unrealistic. It is far more likely (although in our view irrelevant to the legal rights of the parties) that the staggered return of the strikers was the maximum concession that the union was able to obtain from the employer. It is common experience that unions seek to secure the reinstatement of all strikers. To that extent, their interests and those of replacements are in direct conflict. Often the replacements and the nonstrikers have a sufficient interest in common with the strikers in the terms of post-strike employment that the formerly working cannot be presumed to have repudiated the union. Only the validity of such a presumption was at issue in *Pennco, Inc.*, 250 NLRB 716, and the footnote in that case cited at p. 9 of that Board Brief was unnecessary to decision. The other NLRB cases there cited are even wider of the mark since the issue in those cases was the *voting* rights of strikers and replacements; these are governed by § 9(c)(3), see p. 8, n.2 *supra*.

> In this respect, the Court concluded that the States need not yield jurisdiction "where the activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . [or] where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act".

The court below stated, in conclusory fashion, that the

> alleged action on the part of the [employer here] is a merely peripheral concern of the N.L.R.B. Conversely, the alleged behavior greatly involves local feeling and responsibility that should be subject to the jurisdiction of the state courts. [Pet. App. C, p 3.]

That conclusion is plainly unsound.

As we have noted, far from being "a merely peripheral concern of the Labor Management Relations Act," "collective bargaining with the right to strike at its core, is the essence of the federal scheme" (*Bus Employees v. Missouri*, 374 U.S. at 82). And as we have also shown, the rules governing the allocation of job rights between strikers and strike replacements is a critical aspect of that federal scheme.

Likewise, there is no merit to the Kentucky Court of Appeals' *ipse dixit* that "the alleged behavior [here] clearly involves local feeling and responsibility that should be subject to the jurisdiction of the state courts." (Pet. App. C, p. 3.) In declaring the "deeply rooted in local feeling and responsibility" exception to the exclusive jurisdiction of the NLRB, Justice Frankfurter did not prescribe a formula whose mere incantation by a state court can exorcise the spirit of the federal labor law; rather, he was declaring a principled rule of federalism. See, in addition to 359 U.S. at 243-244, the discussion of the cases that preserve state jurisdiction over "conduct

marked by violence and imminent threats to the public order. * * * State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction" (*id.* at 247).

In extending this principle to willful or reckless defamation (*Linn, supra*) and to intentional infliction of emotional distress by outrageous conduct (*Farmer* v. *Carpenters*, 430 U.S. 290) this Court again stressed the states' substantial interest in protecting their citizens from particularly heinous kinds of injury akin to physical harm quite distinct from the economic injury caused by a job loss during concerted activity that is the focus of the NLRA. (See *Linn*, 383 at 61-62; *Farmer*, 430 U.S. 302-303.) In both of those cases the Court made it plain that the determination that the state has an overriding interest in so protecting its citizens is not sufficient to preserve state court jurisdiction, but is only one of "a number of factors [which] influenced the Court to depart from the *Garmon* rule" (*Farmer*, 430 U.S. at 298; see also *Linn*, 383 U.S. at 61-63.) Moreover, in *Farmer* the Court "reiterate[d] that concurrent state court jurisdiction cannot be permitted where there is a realistic threat of interference with the federal regulatory scheme", and narrowly circumscribed the state claim to preclude any such threat of interference. (430 U.S. at 305; see also *Linn*, 383 U.S. at 64-66.)

In the present case, the state court did not and could not demonstrate any interest of the same nature as the interest in preserving domestic peace and the interest in protecting its citizens against serious injury to their reputation and against severe emotional distress "which is so outrageous that 'no reasonable man in a civilized society should be expected to endure it,'" (*Farmer*, 430 U.S. at 302, quoting the trial court's instruction as to the injury which the plaintiff must establish). Nor are

the other conditions for avoiding federal labor law preemption stated in *Linn* and *Farmer* met by the plaintiffs' claim. On the contrary, recognition of that claim would inevitably interfere with the collective bargaining process, and the respective rights and obligations of employers, unions and employees during a strike as declared by federal law.

CONCLUSION

For the foregoing reasons the judgment below should be reversed.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1981

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Respondents.

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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Respondents.

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America ("the Chamber") respectfully moves for leave to file a brief *amicus curiae* in support of the position of Petitioner.[1] In support of this motion, the Chamber states as follows:

1. The Chamber is a federation consisting of more than 3,700 state and local chambers of commerce and trade and professional associations, and a direct business membership in

[1] Pursuant to Rule 36 of the Rules of this Court, the Chamber solicited the consent of all parties to the filing of a brief *amicus curiae*. Counsel for Petitioner consented. Counsel for Respondents, however, refused to consent.

excess of 200,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in important labor relations matters. Such representation constitutes a significant aspect of the Chamber's functions. Accordingly, the Chamber has sought to advance these interests in a wide spectrum of labor relations litigation before this and other courts.

2. The question presented in this case—whether employees may invoke state law to override the terms of an agreement negotiated by their collective bargaining representative—is a matter of substantial importance to the Chamber. The decision below impermissibly "impinge[s] on the area of labor combat designed to be free." *Garner v. Teamsters Union*, 346 U.S. 485 (1953). It sanctions a state cause of action that would upset the accommodation of interests freely reached by the parties to a collective bargaining relationship. It fosters labor unrest by allowing employees to sue their employer to obviate the terms of a strike settlement agreement executed by their exclusive bargaining representative. It subjects the actions of unionized employers during the collective bargaining process to the vagaries of state law, the very result the labor preemption doctrine was designed to prevent.

This case thus transcends the interests of the particular parties involved and raises a matter of recurring importance in the administration of the National Labor Relations Act. For these reasons, the Chamber respectfully requests leave to present its views.

Respectfully submitted,

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BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

This brief is filed on behalf of The Chamber of Commerce of the United States of America contingent upon the Court's granting the annexed motion for leave to file a brief *amicus curiae.*

INTEREST OF THE AMICUS CURIAE

The interest of the Chamber is set forth in its annexed motion for leave to file a brief *amicus curiae.*

SUMMARY OF ARGUMENT

In enacting the National Labor Relations Act ("the Act"), Congress established a comprehensive national labor policy to obtain uniform administration of the "substantive rules and to

avoid the 'diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.' " *N.L.R.B. v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971), quoting *Garner v. Teamsters Union*, 346 U.S. 485, 490 (1953). The doctrine of labor preemption was designed to preserve this uniform federal labor policy since "nothing could serve more fully to defeat the congressional goals underlying the Act than to subject . . . the relationships it seeks to create to the concurrent jurisdiction of state and federal courts free to apply the general local law." *Amalgamated Assoc. of Street Employees v. Lockridge*, 403 U.S. 274, 286 (1971). As a result, this Court has established two distinct areas in which a state may not act: "[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield" (*San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959)) and a "second line of preemption . . . cases focusing upon the crucial inquiry whether Congress intended that the conduct involved be unregulated . . ." *I.A.M., Lodge 76 v. Wisconsin Emp. Rel. Comm'n*, 427 U.S. 132, 140 (1976).

In asserting jurisdiction over this case, the Kentucky court reasoned that the issues involve "merely a peripheral concern of the [Act] . . . [which] greatly involves local feeling and responsibility that should be subject to the jurisdiction of the state courts." Pet. App. C, p. 3. That court viewed the subject matter of this action as analogous to the libel area excepted from the ambit of labor preemption by *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966). The *Linn* exception, however, affects only the *Garmon* doctrine; the second line of preemption cases is left "unaffected" by *Linn* and other decisions limiting the scope of *Garmon*. *Sears, Roebuck and Co. v. San Diego Carpenters*, 436 U.S. 180, 199, n. 30 (1978). Even assuming, therefore, that preemption is not warranted under

the *Garmon* doctrine in a particular case, a state nevertheless may not regulate conduct arising out of a labor controversy unless it is first determined that Congress intended to permit state regulation of the issues presented by that dispute. No such conclusion is possible in this case for at least three reasons: *first*, where, as here, employees have selected a labor organization as their exclusive bargaining representative, their individual employment rights, whether predicated upon state contract or tort law, must yield; *second*, where, as here, Congress intended the conduct at issue to be governed by the "free play of economic forces" (*Nash-Finch Co.*, 404 U.S. at 144 (1971)), "the inconsistent application of state law is necessarily outside the power of the State . . . ." (*Local 24 of the International Brotherhood of Teamsters v. Oliver*, 358 U.S. 283, 296 (1959)); and *finally*, where, as here, state law is invoked to supersede the terms of a Labor Board strike settlement agreement, "responsible and stable labor relations would suffer, and the attainment of the labor policy objective of minimizing disruption of interstate commerce would be made more difficult." *Retail Clerks International Association v. Lion Dry Goods*, 369 U.S. 17, 27 (1962).

ARGUMENT

I. The Decision Below Contravenes The Union's Role As The Exclusive Representative Of All Bargaining Unit Employees

In enacting the Act, Congress recognized that "by pooling their economic strength and [by] acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements . . . ." *N.L.R.B. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). "National labor policy . . . therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interest of all employees." *Id.* The union is the "exclusive representative" of all bargaining unit employees by reason of Section 9(a) of the Act; "[t]hus only the union may contract the employee's terms and conditions of employment . . . ." *Id.*

This majoritarian principle mandates that any accommodation of employee rights and interests struck by a union and an employer be binding on all affected employees. The system "of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit." *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). The negotiated collective agreement, in effect, bargains away any individual rights in exchange for benefits derived by the total unit; the collective agreement necessarily supersedes any pre-existing individual agreements or other enforceable individual promises arising under state law.[1] A negotiated strike settlement agreement similarly must supplant any individual agreements or promises.

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[1] See *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 337 (1944), where this Court held that individual contracts, "no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining . . . ."

As members of the bargaining unit, the Respondents were bound by the strike settlement agreement negotiated on behalf of the entire unit by their exclusive representative. The contrary decision of the court below, which concluded that the Respondents may vitiate the provisions of the collective agreement through individual state causes of action, impermissibly undermines the majoritarian principle which is "[c]entral to the policy of fostering collective bargaining." *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 62 (1975). Once a group of employees exercise their right to be represented by a labor union, individual employment rights, whether predicated upon state contract or tort law, must yield.

Congress established the majoritarian principle "in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority." *Emporium Capwell*, 420 U.S. at 62. It recognized that "[t]he complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). In vesting unions with broad power, however, "Congress did not . . . authorize a tyranny of the majority over minority interests." *Emporium Capwell*, 420 U.S. at 64. "[B]y the very nature of the exclusive bargaining representative's status as representative of all unit employees, Congress implicitly imposed upon it a duty fairly and in good faith to represent the interests of minorities within the unit." *Id.* This duty of fair representation stands "as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca*, 386 U.S. at 182. The Respondents' proper recourse for any alleged impropriety, therefore, was to invoke this principle of fair representation, not to assert individual employment rights to undermine the product of the collective efforts of their bargaining representative.

II. The Decision Below Impermissibly Impinges Upon The Process Of Free Collective Bargaining

The Act was enacted to facilitate the free flow of interstate commerce "by encouraging the practice and procedure of collective bargaining." 29 U.S.C. §151.[2] An integral component of this process of collective bargaining is the contemplation that labor and management may "resort to economic weapons should more peaceful measures not avail." *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300, 317 (1965). Accordingly, the "two factors—necessity for good faith bargaining between parties and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side." *N.L.R.B. v. Insurance Agents' International Union*, 361 U.S. 477, 489 (1960).

This Court has consistently recognized that this federal bargaining framework "would be upset if a state could also enforce statutes or rules of decision resting upon its views concerning accommodation of the same interests." *I.A.M., Lodge 76*, 427 U.S. at 140, n. 4, quoting Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1352 (1972). State action which in any way upsets the delicate "balance of power between labor and management expressed in our national labor policy" is therefore preempted. *Teamsters, Local 20 v. Morton*, 377 U.S. 252, 260 (1964). These maxims are applicable, of course, to the use of employer economic weapons such as the employment of replacements during a strike; the exercise of state authority "to curtail or entirely prohibit [such] self-help would frustrate effective implementation of the Act's processes." *I.A.M., Lodge 76*, 427 U.S. 132 at 148, quoting *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 380 (1969).

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[2] See also *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395, 401-402 (1952) (The Act "is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers").

It is precisely this impermissible state interference with the process of collective bargaining contemplated by the Act that would result from the opinion below.[3] If the Respondents here are permitted to invoke state law to require adherence to alleged promises of job security, notwithstanding that such adherence could be unlawful under the Act and that the promises may have themselves violated the Act (see, e.g., *N.L.R.B. v. Laredo Coca Cola Bottling Co.*, 613 F.2d 1338, 1340-1341 (5th Cir. 1980), *cert. den.*, 101 S. Ct. 246 (1980)), a host of other similar intrusions on the process of collective bargaining, including the use of economic weapons during a strike, are equally possible. For example, although promises to reward employees who abandon a strike and return to work are unlawful under the Act (see, e.g., *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221 (1963); *George Banta Company, Inc. v. N.L.R.B.*, ____ F.2d ____, 110 LRRM 3351 (D.C. Cir. 1982)), under the Kentucky decision the resultant failure to honor those promises would give rise to a state cause of action. Similarly, where an employer accedes to union pressure by reinstating strikers and displacing strike replacements, although he may or may not have a right to do so under the Act, the

[3] In applying the preemption doctrine, there is no significance to the fact that the state action may sound in contract or tort or may involve a law of general application rather than a law explicitly regulating the conduct of parties to a labor-management dispute. "It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern." *Lockridge*, 403 U.S. at 292. A state law with purposes and applications beyond the sphere of labor-management relations nonetheless may impinge upon federal labor policy if, when applied to a collective bargaining relationship, it frustrates the policies of federal law. See *New York Telephone Company v. New York State Department of Labor*, 440 U.S. 519 (1979). Thus, in applying the preemption doctrine, it has not "mattered whether the states have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations." *San Diego Building Trades Council v. Garmon*, 359 U.S. at 244.

displaced employees presumably could in either instance assert state contract or tort rights to frustrate the employer's decision. Or where an employer exercises its right to unilaterally change terms and conditions of employment following a good faith negotiating impasse, the affected employees presumably could assert that the changed employment terms violate pre-existing individual contracts arising under state law.[4] Or even where, as here, an employer and a union actually reach an agreement to resolve their dispute, one or more employees could seek to circumvent the terms of that agreement by invoking inconsistent rights arising under state law. All of these "incompatible doctrines of local law," it is submitted, "must give way to principles of federal labor law." *Morton*, 377 U.S. at 258, quoting *Teamsters, Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 102 (1962).

This is not the first time this Court has been confronted with the situation where a state court has applied state law to frustrate an agreement freely negotiated by labor and management. In *Oliver*, the Ohio courts held that the Ohio antitrust law, a law of general application, rendered invalid on antitrust grounds a collective bargaining agreement establishing the minimum rental terms an employee could charge for leasing his vehicle. In rejecting this decision, this Court stated that "[t]he purposes of the [labor] Acts are served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves." 358 U.S. at 295. The application of the state law "would wholly defeat the full realization of the congressional purpose . . . [and it] would frustrate the parties' solution of a problem which Congress has required them to negotiate . . . toward solving, and in the solution of which it imposed no limitations relevant here." 358

[4] See e.g., *Clifford Roberts, et al. v. Automobile Club of Michigan, et al.*, 82-203-440-CZ (Mich. Cir. Ct. Wayne County, May 28, 1982), *app. pend.* Mich. Ct. App., which held that the state courts were not preempted in such a case.

U.S. at 295-296. As in *Oliver*, "[s]ince the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State." 358 U.S. at 296.

III. The Decision Below Frustrates The Act's Strike Settlement Processes

This Court has recognized that the strike settlement process plays an important role in both the restoration of industrial peace and the ordering of the employment relationship. In *Lion Dry Goods*, as in this case, the enforceability of a strike settlement agreement providing for the reinstatement of strikers was at issue. This Court held that the agreement constituted an enforceable contract under the federal labor law. It reasoned that, if the agreement was not enforceable, "responsible and stable labor relations would suffer, and the attainment of the labor policy objective of minimizing disruption of interstate commerce would be made more difficult." 369 U.S. at 27. The strike settlement agreement "is clearly an agreement between employers and labor organizations significant to the maintenance of labor peace between them. It came into being as a means satisfactory to both sides for terminating a protracted strike and labor dispute .... It resolved a controversy arising out of, and importantly and directly affecting, the employment relationship." 369 U.S. at 28.

Any application of state law which impinges upon the strike settlement processes, or the terms of a strike settlement agreement, is therefore preempted. Respondents admittedly seek to invoke alleged rights under state law to thwart that part of the strike settlement agreement here which provides that 35 strikers will be reinstated each month and that any discharged replacements will be considered for reinstatement once the striking employees have been recalled. In finding that the Respondents may challenge the propriety of this agreement by bringing suit under state law, the decision below impermissibly

vitiates the Act's strike settlement processes, it impermissibly fosters industrial discord, and it impermissibly disrupts the employment relationship. Respondents may not invoke state law to so flagrantly "interfere with the effective administration of our national labor policy." *Farmers v. United Brotherhood of Carpenters,* 430 U.S. 290, 298 (1977).

Furthermore, in sanctioning the utilization of state law in this case, the decision below will discourage the peaceful settlement of labor disputes. Settlement agreements would be subject to attack by not only displaced strike replacements, but by any other employee or even any member of the public at large who can rely on an infinite variety of legal theories grounded in state law. Rather than settling unfair labor practices and thereby reestablishing industrial peace and harmonious labor relations, employers will be encouraged instead to litigate unfair labor practice charges in order to preclude the potential of costly state actions.

IV. The Decision Below Denigrates Congress' Desire To Establish A National Labor Policy

In allowing state courts to assume jurisdiction in this case, the decision below frustrates Congress' desire to fashion a "comprehensive national labor law." *Lockridge*, 403 U.S. at 286.

The employment rights of employees under state common or statutory law vary substantially from state to state. Rather than the desired "uniform application of the Act's . . . substantive rules" (*Garner*, 346 U.S. at 490), under the decision below the rights of employees, employers and labor organizations would differ significantly depending on the particular state involved. Indeed, in a multi-state strike, a not uncommon phenomenon, these rights could shift based solely on the residence of an individual striker. In some states, for example, an employer is bound by oral or written personnel policies and practices or by an implied duty of good faith and fair dealing;[5] in other states an employee may challenge the propriety of his

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[5] Michigan and California courts have held that employer personnel policies and practices, including promises not to terminate absent good cause, are enforceable. In *Toussaint v. Blue Cross and Blue Shield of Michigan*, 292 N.W.2d 880 (Mich. 1980), the Michigan Supreme Court held that an employer's oral or written policies or practices, including a promise not to terminate without proper cause, constitute a binding contract. In *Cleary v. American Airlines, Inc.*, 168 Cal. Rptr. 722 (Cal. Ct. App. 1980), the court held that an employee may sue his employer under a wrongful discharge tort theory where the employee's termination is carried out in a manner which is contrary to the termination procedure outlined in a personnel manual. Cf. *Sargent v. Illinois Institute of Technology*, 397 N.E.2d 443 (Ill. App. 1979) and *Johnson v. National Beef Packing Co.*, 551 P.2d 779 (Kan. 1976), where the courts rejected these approaches.

In Massachusetts and California, courts have also approved an employee cause of action based on a wrongful discharge theory where a termination breached the covenant of good faith and fair dealing deemed implicit in the employment relationship. *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917 (Cal. Ct. App. 1981); *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977).

termination under a "wrongful discharge" tort theory grounded in a violation of some public policy;[6] in still other states employees may be terminated "at will".[7]

In this case, the Respondents seek to enforce rights provided unrepresented employees under Kentucky law notwithstanding that, as bargaining unit employees represented by a labor union, they are granted significant rights under the

[6] In at least nine states an employee has an action for wrongful discharge when his termination violates "public policy". See, e.g., *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385 (Conn. 1980); *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353 (Ill. 1978); *Reuther v. Fowler & Williams, Inc.*, 386 A.2d 119 (Pa. 1978); *Roberts v. Atlantic Richfield Co.*, 568 P.2d 764 (Wash. 1977); *Sventko v. Kroger Co.*, 245 N.W.2d 151 (Mich. App. 1976); *Nees v. Hocks*, 536 P.2d 512 (Ore. 1975); *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974); *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973); *Petermann v. International Brotherhood of Teamsters*, 344 P.2d 25 (Cal. Ct. App. 1959), *aff'd*, 29 Cal. Rptr. 399 (Cal. Ct. App. 1963). In addition, at least twelve states have expressed a willingness to accept the public policy exception, but have not yet formally adopted the exception. See, e.g., *Adler v. American Standard Corp.*, 432 A.2d 464 (Md. 1981); *Smith v. Atlas Off-Shore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981); *Kenealy v. Orgain*, 606 P.2d 127 (Mont. 1980); *Mau v. Omaha National Bank*, 299 N.W.2d 147 (Neb. 1980); *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505 (N.J. 1980); *Ward v. Frito-Lay, Inc.*, 290 N.W.2d 536 (Wis. Ct. App. 1980); *Jones v. Keogh*, 409 A.2d 581 (Vt. 1979); *Larsen v. Motor Supply Co.*, 573 P.2d 907 (Ariz. Ct. App. 1977); *Lampe v. Presbyterian Medical Center*, 590 P.2d 513 (Colo. Ct. App. 1978); *Abrisz v. Pulley Freight Lines, Inc.*, 270 N.W.2d 454 (Iowa 1978); *Jackson v. Minidoka Irrigation District*, 563 P.2d 54 (Idaho, 1977); *Scroghan v. Kraftco Corp.*, 551 S.W.2d 811 (Ky. 1977).

[7] In states adhering to the common law employment at will doctrine, employees may be terminated for a good reason, a bad reason, or no reason at all. See, e.g., *Catania v. Eastern Airlines, Inc.*, 381 So.2d 265 (Fla. Dist. Ct. App. 1980); *Hudson v. Zenith Engraving Co.*, 259 S.E.2d 812 (S.C. 1979); *Watson v. Zep Manufacturing Co.*, 582 S.W.2d 178 (Tex. Ct. App. 1979); *Georgia Power Company v. Busbin*, 250 S.E.2d 442 (Ga. 1978); *Hinrichs v. Tranquilaire Hospital*, 352 So.2d 1130 (Ala. 1977).

federal labor law and are bound by the agreements negotiated by their union. In allowing strike replacements to invoke these state rights the decision below undermines Congress' desire to structure a uniform national labor policy. It improperly subjects the actions of unionized employers taken during the collective bargaining process to the vagaries of state law.

CONCLUSION

For all of the foregoing reasons, the decision of the Court of Appeals of the Commonwealth of Kentucky should be reversed.

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No. 81-1966

In the Supreme Court of the United States

OCTOBER TERM, 1982

BELKNAP, INC., PETITIONER

v.

DUWAINE E. HALE, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE NATIONAL LABOR RELATIONS BOARD

The question presented in this case is whether the National Labor Relations Act (NLRA) preempts a state court suit for damages brought against an employer subject to the NLRA by individuals who were hired to replace striking employees and later terminated pursuant to a strike settlement agreement approved by the National Labor Relations Board and entered into by the employer and its employees' union representative. The National Labor Relations Board

believes that to permit such state court suits would interfere with the regulatory scheme contained in the NLRA and would undermine the Act's objective of encouraging the peaceful settlement of labor disputes. The Board therefore has a significant interest in the proper application to this case of the doctrine of preemption, which is designed to preclude such state interference with the uniform administration of federal law.

STATEMENT

1. In 1974, Teamsters Local Union No. 89 ("the Union") was certified by the National Labor Relations Board ("the Board") as the exclusive bargaining representative for the warehouse and maintenance employees of Belknap, Inc. ("the Company"). The Company and the Union then signed a collective bargaining agreement. The contract expired on January 31, 1978, before an agreement on a new contract was reached. The following day, the Union called a strike in which 400 employees participated. The Company granted a wage increase, effective February 1, 1978, to unit employees who stayed on the job. It also advertised for and later hired "permanent" replacements for its striking employees (Pet. 3; Pet. App. F 5).[1]

During the strike, a number of unfair labor practice charges were filed against the Company and the Union. The Company also filed a state court action against the Union, seeking both injunctive and compensatory relief. Following an investigation, the Board's Regional Director issued a complaint alleging that the Company had unlawfully instituted the February 1 wage increase without notice to the Union.

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[1] A copy of the newspaper advertisement (see Pet. App. A 3) is set forth in the Appendix to the Board's Brief as Amicus Curiae in Support of the Petition (Br. 1a).

The General Counsel also issued a complaint against the Union for alleged picket line violence (Pet. 3; Pet. App. F 5).

In July 1978, representatives of the Company and the Union met with the Board's Regional Director to discuss the settlement of the pending unfair labor practice complaints. The Director indicated that he would approve the withdrawal of the unfair labor practice charges if the Company and the Union reached an amicable strike settlement agreement. As a result of this conference, the parties entered into an agreement that ended the strike, terminated the state court litigation, specified the terms of a new contract, and provided that 35 strikers would be reinstated each month until all the strikers had been offered reinstatement (Pet. App. E 1-4). The Regional Director then approved the withdrawal of the unfair labor practice charges (Pet. 3-4).

2. In order to reinstate the strikers in accordance with the strike settlement agreement, the Company laid off some of the strike replacements. However, the laid-off strike replacements were informed that they would be considered for reemployment once all the striking employees had been recalled (Pet. 4).

Respondents, twelve of the laid-off strike replacements, then filed a class action against the Company in state court in Kentucky for fraud and breach of contract. Seeking to represent a class consisting of all the laid-off strike replacements, respondents alleged that the Company had induced members of the class to enter into employment contracts by offering them "permanent employment" even though the Company had never intended to hire permanent replacements. They also claimed that the Company had breached its employment contracts with them by entering into a strike settlement agreement that re-

quired reinstatement of the strikers. Each member of the class sought ~~$250~~$500,000 each in compensatory and punitive damages (Pet. App. A 1-5).

The trial court granted the Company's motion for summary judgment on the ground that the action was preempted by federal labor law. However, the Kentucky Court of Appeals reversed, concluding that the action was not preempted for two reasons. First, the court stated that respondents' complaint did not allege conduct constituting an unfair labor practice. The court observed that petitioner's alleged conduct did not violate Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), which prohibits "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." The court reasoned that respondents "were non-union workers who sought full-time employment with [the Company], rather than membership in any particular labor organization" (Pet. App. C 3). Second, the court concluded that in this case, as in *Linn* v. *United Plant Guard Workers*, 383 U.S. 53 (1966), the conduct at issue was "a merely peripheral concern" of the Board and "greatly involve[d] local feeling and responsibility that should be subject to the jurisdiction of the state courts." The Court of Appeals directed the trial court to "reassume jurisdiction of the action, and allow the action to proceed on its merits" (Pet. App. C 3-4).

3. The Supreme Court of Kentucky initially agreed to review the decision of the Court of Appeals, and the Board was granted leave to file a brief as amicus curiae. However, the Kentucky Supreme Court later vacated its grant of discretionary review and re-

manded the case to the Court of Appeals for final disposition [2] (Pet. App. D 1).

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[2] The petition sought a writ of certiorari to the Supreme Court of Kentucky. However, that court did not rule on the merits of this case. It initially granted discretionary review of the decision of the Kentucky Court of Appeals, but later vacated its previous order and stated that review had been improvidently granted. Thus, the judgment properly subject to review in this Court is that of the Kentucky Court of Appeals. *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 678 n.1 (1968); *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 160 (1954). However, the time for filing the petition runs from the date of the order of the Supreme Court of Kentucky refusing to review the lower court's decision. *American Railway Express Co.* v. *Levee*, 263 U.S. 19, 20-21 (1923); R. Stern and E. Gressman, *Supreme Court Practice* § 6.2, at 398 (1978). Although the petition in this case was captioned as a petition to the Supreme Court of Kentucky it should be treated as a petition to the Kentucky Court of Appeals. Cf. *Palmore* v. *United States*, 411 U.S. 389, 396-397 (1973); *Garrity* v. *New Jersey*, 385 U.S. 493, 496 (1967); 28 U.S.C. 2103.

The Court of Appeals' order reversing the trial court's grant of summary judgment and directing that court to proceed to hearing on the complaint definitively resolved the federal preemption issue and therefore is a final judgment under 28 U.S.C. 1257. See *Construction Laborers* v. *Curry*, 371 U.S. 542 (1963); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 483 (1975). This is a case "where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review [in this Court] might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceeding still to come" (*Cox Broadcasting Corp.* v. *Cohn*, *supra*, 420 U.S. at 482-483). "In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court

SUMMARY OF ARGUMENT

States are preempted from regulating conduct intended by Congress " 'to be controlled by the free play of economic forces' " (*Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132, 140 (1976)). States also may not burden privileges accorded to labor disputants under federal law. *Nash* v. *Florida Industrial Commission*, 389 U.S. 235 (1967). In the present case, respondents' state court action, if permitted to go forward, would violate these precepts.

Federal labor law seeks to ensure a balance of economic power between labor and management. One of the fundamental economic weapons given employers is the right to hire permanent strike replacements during an economic strike. Respondents' misrepresentation claim would disturb the balance of economic power by seeking to have the state regulate the

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has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation" (*id.* at 483). The federal issue—whether the state court's jurisdiction over appellee's tort and contract claims is preempted by federal law—has been finally decided in the state courts, although there are to be further proceedings in which petitioner might prevail on the merits on nonfederal grounds. Reversal of the court of appeals on the federal issue would, however, preclude further proceedings and a refusal to hear the issue at this stage might "seriously erode federal policy" (*ibid.*). Accord, *Local No. 438, Construction Laborers* v. *Curry*, 371 U.S. 542, 549-550 (1963). In this case, the federal policy is one of protecting parties subject to Board jurisdiction from facing proceedings "which the state courts have no power to conduct" (371 U.S. at 550).

In addition, there appears to be no likelihood that further federal issues will arise in the case and thus no likelihood of piecemeal review. Compare, *Flynt* v. *Ohio*, 451 U.S. 619, 621 (1981).

employer's offer of permanent employment to the replacements.

While an employer may hire permanent replacements during an economic strike, it may not do so during an unfair labor practice strike. Whether a particular strike is an economic or an unfair labor practice strike, however, is not always clear and often cannot be determined until after the strike has ended. Thus, if an employer's right to hire permanent replacements is to have the full intended effect, the employer must be free to offer permanent employment to the replacements in the large percentage of cases in which the nature of the strike is not entirely free from doubt. In such cases, of course, it may ultimately be found that the strike was caused or prolonged by unfair labor practices and that the strikers are consequently entitled to displace the replacements. Furthermore, even in the case of economic strikes, strike settlement agreements, which are favored by federal labor policy, frequently provide for the reinstatement of the strikers, thereby causing some or all of the replacements to be laid off. Thus, under the National Labor Relations Act, strike replacements who are offered permanent employment must assume the risk that they may later be displaced by returning strikers, either because the strike has been found to have been caused or prolonged by unfair labor practices on the part of the employer or because of a settlement agreement. If replacements terminated for these reasons may sue the employer for damages on the theory that its offer of permanent employment was fraudulent, an additional burden will be placed upon the right of employers to hire replacements and the balance of economic power will be altered.

Respondents' claim for breach of contract is also preempted. The Company discharged the replacements in order to comply with the strike settlement agreement negotiated with the Union that represented all of the employees, including the strike replacements. Consequently, respondents were bound by that agreement and had rights no greater than those recognized in it. Moreover, the employer was obligated under the National Labor Relations Act to comply with the strike settlement agreement and would have been required to reinstate the strikers in any event if the strike was determined to have been an unfair labor practice strike, as the National Labor Relations Board had charged. Accordingly, respondents' contract claim was preempted because it sought to regulate activities that are " 'protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8' " (*Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 288-291 (1971)).

Respondents' suit does not fall within the recognized exceptions to the preemption doctrine. Because it would alter the balance of economic forces in labor disputes and would interfere with the administration of national labor policy, it is not "a 'merely peripheral concern of the * * * Act' " (*Linn* v. *United Plant Guard Workers*, 383 U.S. 53, 61 (1966)).

ARGUMENT

THE NATIONAL LABOR RELATIONS ACT PREEMPTS A STATE COURT SUIT FOR DAMAGES BROUGHT AGAINST AN EMPLOYER BY STRIKE REPLACEMENTS WHO WERE LAID OFF BY THE EMPLOYER IN ORDER TO COMPLY WITH A STRIKE SETTLEMENT AGREEMENT ENTERED INTO WITH THE EMPLOYEES' UNION REPRESENTATIVE

A. The National Labor Relations Act Forecloses State Action That Tends To Upset The Balance Of Economic Weapons Available To Labor And Management In A Labor Dispute And To Impose Penalties On Persons For Engaging In Conduct That The Act Either Affirmatively Protects Or Deliberately Leaves To The Free Play Of Economic Forces

In *Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132, 140 (1976), this Court held that states are preempted from regulating conduct intended by Congress " 'to be controlled by the free play of economic forces.' " There, the Court held that a state labor relations authority could not enjoin a union and its members from refusing to work overtime in order to put economic pressure on the employer in collective bargaining. Although that case dealt with economic weapons utilized by labor, the Court pointed out (*id.* at 147) that "self-help is of course also the prerogative of the employer because he, too, may properly employ economic weapons Congress meant to be unregulable." State regulation of such weapons is prohibited because Congress has struck the balance between the contending parties in labor disputes, and states are not free to alter that balance. As the Court has explained (*Teamsters Local 20* v. *Morton*, 377 U.S. 252, 260 (1964), quoting *Garner* v. *Teamsters' Union*, 346 U.S. 485, 500 (1953)):

> For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.

It is also well established that states may not burden privileges accorded to labor disputants under federal law. In *Nash* v. *Florida Industrial Commission*, 389 U.S. 235 (1967), this Court held that the Supremacy Clause was violated by a state law that denied unemployment insurance to persons who filed unfair labor practice charges against their employers with the Board (*id.* at 239-240). The Court found (*id.* at 239) that the state law had "a direct tendency to frustrate the purpose of Congress to leave people free to make charges of unfair labor practices to the Board". And it concluded (*ibid.*) that the "financial burden" imposed by the state would impermissibly "defeat or handicap a valid national objective," *i.e.*, "congressional reliance on individual action" to initiate unfair labor practice proceedings.

In the present case, respondents' state court action, if permitted to go forward, would violate these precepts. It would burden an economic weapon that Congress intended to be freely available to employers, and it would frustrate the federal policy of encouraging the peaceful resolution of labor disputes. Accordingly, state action here is preempted.[3]

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[3] Other states have regarded similar activity as a matter of exclusive federal responsibility. See *U.S. Chamber of Commerce* v. *New Jersey*, 110 L.R.R.M. 2328, 2335 (N.J. Sup. Ct. May 3, 1982) (state statute prohibiting recruitment and hiring of strike replacements is preempted by the NLRA as interfering with the balance of economic power between labor and management); *People* v. *Federal Tool and Plastics, Divi-*

B. The State Court Damage Action Based On An Alleged Fraudulent Inducement Makes Actionable Conduct Sanctioned By Federal Labor Policy And Frustrates The Act's Policy Of Encouraging Settlement Of Labor Disputes

The National Labor Relations Act comprehensively regulates the rights and obligations of employers and employees in strike situations. It seeks to ensure a balance of economic power between labor and management. The way in which respondents' state suit for fraudulent inducement would affect that balance can readily be explained.

The right to strike is the fundamental economic weapon guaranteed to employees by Sections 7 and 13 of the NLRA, 29 U.S.C. 157 and 163. *NLRB* v. *International Rice Milling Co.*, 341 U.S. 665, 672-673 & n.8 (1951). As a counter to this weapon, employers may hire permanent replacements for the strikers if the strike is an "economic strike" but may not do so if the strike is an "unfair labor practice strike."[4]

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sion of V.C.A., 62 Ill.2d 549, 553-554, 344 N.E.2d 1, 3-4 (1975) (state statute requiring employers to notify prospective replacements that a strike is in progress is preempted by the NLRA because it burdens the employer's right to obtain strike replacements and upsets the balance of economic power established by the Act).

[4] An economic strike is one called to extract economic concessions. See, *e.g.*, *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967). An unfair labor practice strike is one called in response to an employer's violation of the NLRA. If, during an economic strike, an employer commits what the Board later determines to be an unfair labor practice and the union continues the strike beyond its natural duration to protest that practice, the strike is converted into an unfair labor practice strike. In such circumstances, the strikers become unfair labor practice strikers on the date of the conversion. If they subsequently make an unconditional offer to return to work, they are entitled to immediate reinstatement if they

NLRB v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938). Whether a particular strike is an economic strike or an unfair labor practice strike, however, is often unclear until the strike has ended. Where the character of a strike is contested, as it frequently is, the issue must be resolved in an unfair labor practice proceeding before the Board.[5] Thus,

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had not been permanently replaced before the strike's conversion. *Philip Carey Mfg. Co., Miami Cabinet Div.* v. *NLRB*, 331 F.2d 720, 729 (6th Cir.), cert. denied, 379 U.S. 888 (1964); *NLRB* v. *Johnson Sheet Metal, Inc.*, 442 F.2d 1056, 1061 (10th Cir. 1971). See Stewart, *Conversion of Strikes: Economic to Unfair Labor Practice*, 45 Va.L.Rev. 1322 (1959); 49 Va.L.Rev. 1297 (1963).

[5] It is often not clear, or is disputed, whether employees have gone out on strike over economic issues or over employer conduct that might be adjudged by the Board to constitute an unfair labor practice. Moreover, as noted above (pages 11-12 note 4, *supra*), a strike that originated as an economic strike may be converted into an unfair labor practice strike. Uncertainty may be further heightened by the fact that picket line misconduct, in some circumstances, may deprive strikers of reinstatement rights, even if the strike is adjudged to have been caused or prolonged by unfair labor practices. *Mosher Steel Co.* v. *NLRB*, 568 F.2d 436 (5th Cir. 1978); *Kayser-Roth Hosiery Co.* v. *NLRB*, 447 F.2d 396 (6th Cir. 1971).

The instant case illustrates these complications. The strike was called to extract bargaining concessions from the Company, and therefore began as an economic strike. On February 1, on the same day on which the strike began, the Company granted a 50 cent per hour wage increase without notifying or bargaining with the Union. On April 24, the Board issued an unfair labor practice complaint, alleging among other things that the wage increase violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), and converted the strike into an unfair labor practice strike. In the interim, the Company had hired most of the replacements. Moreover, since the Board also issued a complaint against the Union for picket line

if an employer's right to hire permanent replacements were limited to those relatively rare situations in which it is perfectly clear that a strike is an economic one (*i.e.*, that it was not caused or prolonged by unfair labor practices), the utility of that fundamental economic weapon would be extremely limited.

When an employer exercises its right to hire permanent replacements, the employer still is obligated to bargain with the union that represents all the employees, and this includes bargaining to settle the strike. The Act encourages strike settlement agreements and therefore permits settlements that provide for the return of the strikers even though this may result in the discharge of the replacements. Such provisions are, in fact, quite common and are vital to the peaceful settlement of many disputes.

If unfair labor practice charges are filed during the strike and the Board issues a complaint, the employer is faced with the decision whether to litigate those charges or to settle the matter on terms that might include reinstatement of the strikers. Settlement not only promotes the Act's policy favoring the peaceful and expeditious resolution of labor disputes but it may be economically advantageous for the employer, since the result of unsuccessfully contesting unfair labor practice charges may be a greatly enlarged backpay liability. In addition, settlement promotes the Board's regulatory mission by decreasing the number of cases that must be resolved through litigation.[6]

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violence, there existed the possibility that some of the strikers might not be eligible for reinstatement.

[6] Over 82% of Board unfair labor practice complaints are resolved through settlement. Since the Board issues nearly 8,000 complaints a year, its regulatory mission would be frustrated by any impediments to settlements. *45th Annual Report of the NLRB* 6, 244 (1980).

Even if no colorable unfair labor practice charges are filed during a strike, an employer may decide after hiring permanent replacements that prudent labor-management relations dictate settling the strike by reinstating the strikers. It must be remembered that the union represents all the employees, including both the strikers and the replacements. 29 U.S.C. 159(a); *Pennco, Inc.*, 250 N.L.R.B. 716, 718 n.17 (1980), enforced, No. 80-1654 (6th Cir. Mar. 16, 1982), petition for cert. pending, No. 81-2103; *C.H. Guenther & Son, Inc.*, 174 N.L.R.B. 1202, 1203 (1969), enforced, 427 F.2d 983, 987 (5th Cir.), cert. denied, 400 U.S. 942 (1970); *Getlan Iron Works, Inc.*, 175 N.L.R.B. 864, 867 (1969). The union must therefore take the interests of both groups into account in entering into a strike settlement agreement. See *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967).

In the instant case, the Company determined that it was necessary to hire permanent replacements for its striking employees in order to continue operating its business during the strike. It therefore advertised for and hired such replacements. Faced with an unfair labor practice complaint that might have ultimately required the rehiring of the striking employees with backpay from the date of their unconditional offer to return to work, the Company later agreed to reinstatement of the strikers as part of a comprehensive settlement of the strike, the outstanding state court litigation, and the pending unfair labor practice complaints. Because of the Act's policy favoring the peaceful settlement of labor disputes, the Board's Regional Director facilitated the agreement by approving the withdrawal of the unfair labor practice charges.

Respondents acknowledge (Br. in Opp. 7) that, although guaranteed permanent employment, they

were terminable at will for such occurrences as a business slowdown. They contend (Br. in Opp. 7-8), however, that the Company engaged in fraudulent conduct by promising them that they would not be laid off even though the Company knew that there was "a very real possibility" that they would be replaced by returning strikers. The Kentucky Court of Appeals agreed that this allegation stated a fraud claim actionable under state law.[7] However, if replacements who are terminated pursuant to a strike settlement agreement may sue their employer for damages on the theory that its offer of permanent employment was fraudulent, a substantial interfer-

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[7] To survive petitioner's motion for summary judgment, respondents had to come forward with some evidence of fraudulent intent, *i.e.*, evidence that when the Company promised them permanent employment, it had no intention of performing that promise. *Lawrence* v. *Risen*, 598 S.W.2d 474, 475 (Ky. App. 1980) (party opposing summary judgment must submit supportive information showing material factual issues); *Major* v. *Christian County Livestock Market*, 300 S.W. 2d 246, 249 (Ky. App. 1957) (claim of fraudulent inducement stated where party makes representations as to future intentions with no intention of carrying them out). The only evidence in the record concerning the Company's intent was that when the Company advertised for permanent replacements it was aware that "if the strike were converted from an economic strike to an unfair labor practice, * * * the National Labor Relations Board could order us to fire all replacement employees immediately and bring back all striking employees" and that there was a "possibility that by agreement the striking work force would be returned in large numbers over a short period of time" (Deposition of Harold Fields, Personnel Director, at 104-105). Accordingly, the state court decided that the bare claim that an employer hired permanent replacements when there was a possibility that the strikers would be rehired is sufficient to state a fraud claim under Kentucky law.

ence with the Act's regulatory scheme would result. The employer would be subject to a potentially costly [8] suit as a result of exercising a right afforded by the Act in the interest of balancing the economic weapons available to labor disputants. Faced with that risk, an employer might either forgo its right to hire permanent replacements or refuse to enter into any strike settlement agreement providing for the return of the strikers, even where, as here, an outstanding unfair labor practice complaint afforded reasonable cause to believe that reinstatement of the strikers would eventually be ordered on the ground that they were unfair labor practice strikers.[9]

If the employer were to forgo its right to hire permanent replacements, it would be less able to continue operations during the strike, and the balance of power between disputants that federal labor policy seeks to maintain would accordingly be upset. On the other hand, if the employer were to exercise its right to hire permanent replacements and thereafter refuse to consider any settlement requiring the return of the strikers, the Act's basic objective of promoting collective bargaining would be frustrated. *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 578-582 (1960); *NLRB* v. *American National Insurance Co.*, 343 U.S.

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[8] In this case, for example, each respondent sought compensatory and punitive damages totalling $500,000.

[9] Even if an employer refused to enter into a settlement agreement and litigated the character of the strike, it might still be vulnerable to a fraud suit under the theory of the complaint filed in this case. If it were ultimately determined that the strike was an unfair labor practice strike and reinstatement of the strikers is required, the replacements could still maintain that the employer fraudulently induced job applicants to accept employment knowing that there was a possibility that reinstatement of the strikers might be ordered.

395, 401-402 (1952). A refusal to settle might also prolong the strike and preclude amicable post-strike relations with the bargaining agent, thereby further frustrating the federal goal of labor peace.

Administrative considerations also dictate that strike settlement agreements be encouraged. Settlement is the life blood of the administrative process. More than 80% of Board complaints are settled (see page 13 note 6, *supra*), and because of the Board's enormous case load (*ibid.*), encouragement of settlement is critical to the effective administration of the Act. See *Wallace Corp.* v. *NLRB*, 323 U.S. 248, 254-255 (1944); *Poole Foundry & Machine Co.* v. *NLRB*, 192 F.2d 740, 742-743 (4th Cir. 1951), cert. denied, 342 U.S. 954 (1952).

An employer could not escape the dilemma posed by the threat of a state court fraud action simply by informing prospective replacements of all the contingencies that might affect their tenure. In the first place, if an employer were to extend only such a conditional offer, its ability to hire replacement workers quickly would be diminished and its chief weapon for combatting the employees' strike pressure would consequently be weakened. Furthermore, such a conditional offer might well render the replacements only temporary hires and would mean that the employer would be obligated to reinstate the strikers even if the strike turned out to be an economic one and even if the employer wanted to retain the replacements.[10] Cf. *Associated Grocers*, 253 N.L.R.B. 31 (1980), en-

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[10] "The justification for not discharging replacements in order to reinstate strikers * * * is the need of the employer to assure permanent employment to the replacements so that the necessary labor force can be obtained to maintain operations during a strike." *Laidlaw Corp.* v. *NLRB*, 414

forced, No. 80-2358 (D.C. Cir. Dec. 1, 1981), petition for cert. pending, No. 81-2069.

In sum, respondents' fraud claim, if permitted to go forward, would significantly alter the delicate balance of economic forces established by the NLRA. Which group would benefit—employers, strikers, or strike replacements—is problematic. The rights of strike replacements might be strengthened, but employers would be discouraged from hiring such workers. The employer's economic weapon of hiring

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F.2d 99, 105 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970). "If an employer hires replacements without a commitment or understanding that the job is permanent * * * the interest in protecting economic strikers by an entitlement to reinstatement is not overcome by a substantial business justification. The employer has not had to offer the jobs on a permanent basis as an inducement to continuing his operations." *NLRB* v. *Mars Sales & Equipment Co.*, 626 F.2d 567, 573 (7th Cir. 1980). Therefore, where an employer asserts the justification of permanent replacements, his burden is to "show that the men [and women] who replaced the strikers were regarded by themselves and the [employer] as having received their jobs on a permanent basis." *Georgia Highway Express, Inc.*, 165 N.L.R.B. 514, 516 (1967), aff'd *sub nom. Truckdrivers and Helpers Local 728* v. *NLRB*, 403 F.2d 921 (D.C. Cir.), cert. denied, 393 U.S. 935 (1968). See also, *e.g.*, *NLRB* v. *Mars Sales & Equipment Co.*, 626 F.2d 567, 573 (7th Cir. 1980); *NLRB* v. *Murray Products, Inc.*, 584 F.2d 934, 939 (9th Cir. 1978); *H. & F. Binch Co.* v. *NLRB*, 456 F.2d 357, 362 (2d Cir. 1972).

The statements which the Company had the replacements sign in this case (see Br. in Opp. 4; Pet. App. A 4) were not designed to lull the replacements into a false security concerning their prospects of continued employment but to satisfy the burden the Company might be called upon to meet in the event of litigation, *i.e.*, to show that it had hired permanent, not temporary, replacements. Such statements are common in the hiring of striking replacements.

strike replacements would be burdened (thereby benefitting strikers), but employers who chose to employ that weapon would probably be more reluctant than they are at present to enter into strike settlement agreements requiring the return of strikers. In any event, the issue in this case is not whether the new balance of forces would be fairer than that provided by the Act. Because respondents' claim would indisputably alter the balance struck by Congress and would regulate conduct that Congress intended to be left unregulated, that claim is preempted by federal law.

C. Respondents' Contract Claims Similarly Provide No Basis For State Court Jurisdiction

Respondents also contend (Br. in Opp. 7) that "binding individual employment contracts were effected between each replacement and Belknap both orally and in writing, to the effect that each replacement would not lose his or her job status *on account of returning strikers*" (emphasis in original). Even if we assume arguendo that the Company entered into such individual employment contracts, they are of no avail to respondents.

If the strikers were engaged in an unfair labor practice strike, as the Board's complaint alleged, the Company was required to offer them reinstatement and, if necessary, to discharge the replacements. *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 278 (1956). In addition, if the Company had refused to reinstate the strikers as required by the strike settlement agreement, it would have violated Section 8(a)(1) of the Act. See *Puritana Manufacturing Corp.*, 159 N.L.R.B. 518, 533 (1966). Accordingly, since respondents' contract claim would require the

employer to take action arguably prohibited by the Act, it is plainly preempted. As this Court noted in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244 (1959):

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield.

See also *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 288-289 (1971).

Further, respondents were themselves bound by the strike settlement agreement that resulted in their discharge. Section 9(a) of the Act, 29 U.S.C. 159(a), provides that a union "shall be the exclusive representative[] of *all the employees* in [the] unit for the purposes of collective bargaining in respect to * * * conditions of employment" (emphasis added). As previously noted (see page 14, *supra*), even during a strike, the union represents all employees in the unit, including both the strikers and their replacements. By making the union the exclusive representative of all the employees, the Act "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). See also *J.I. Case Co.* v. *NLRB*, 321 U.S. 332, 337 (1944) ("Individual contracts * * * may not be availed of * * * to forestall bargaining or to limit or condition the terms of the collective agreement"). As members of the bargaining unit, the strike re-

placements were therefore bound by the collective bargaining agreement negotiated by the Union to end the strike and had rights no greater than those recognized in the strike settlement agreement negotiated by the Union.[11]

D. Respondents' Claims Are Not Within the Recognized Exceptions to the Preemption Doctrine

In *Farmer* v. *United Brotherhood of Carpenters, Local 25*, 430 U.S. 290, 296-297 (1977), this Court noted certain limits to the preemption doctrine. The Court stated (*ibid.*) that the rules of preemption usually applicable in labor cases have not been applied where the activity in question " 'was a merely peripheral concern' " of the federal labor laws or " 'touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction [the court] could not infer that Congress had deprived the States of the power to act.' " The Court added (*id.* at 297; citation omitted) that the preemption doctrine has not been applied " 'where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes.' "

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[11] The fact that the strike settlement agreement staggered the return of the strikers (see page 3, *supra*) indicates that the Union made some effort to accommodate the rights of both the strikers and the replacements. If the replacements believe that they were not fairly treated, they may file charges with the Board or a suit in state or federal court alleging that the Union breached its duty of fair representation. See *Vaca* v. *Sipes*, *supra*, 386 U.S. at 182.

Relying on *Linn* v. *United Plant Guard Workers*, 383 U.S. 53, 61 (1966), the state court held in this case that respondent's action was not preempted because it was of "peripheral concern" to the Act and involved a "compelling state interest." That holding was plainly wrong. In *Linn*, the Court held that malicious libel uttered in the context of a labor dispute was actionable under state law. As the Court explained in *Farmer* (430 U.S. at 298), however, the result in *Linn* was dictated by the following factors:

> First, the Court noted that the underlying conduct—the intentional circulation of defamatory material known to be false—was not protected under the Act, 383 U.S., at 61, and there was thus no risk that permitting the state cause of action to proceed would result in state regulation of conduct that Congress intended to protect. Second, the Court recognized that there was "'an overriding state interest'" in protecting residents from malicious libels, and that this state interest was "'deeply rooted in local feeling and responsibility.'" *Id.* at 61, 62. Third, the Court reasoned that there was little risk that the state cause of action would interfere with the effective administration of national labor policy.

None of those factors is present here. First, as shown above, the Act protects an employer's right to hire permanent strike replacements and to enter into a strike settlement agreement requiring their discharge. Indeed, as previously explained, when an employer hires such replacements it frequently will not know whether the strike is or will be denominated an unfair labor practice strike, and the employer therefore will not know whether retention of the replacements will be permitted or whether the return

of the strikers will be required. Moreover, since the state court action here would chill the use of the employer's main economic weapon, such a suit can hardly be viewed as "a merely peripheral concern of the Act." On the contrary, the balance of economic weapons available to labor and management and their use as permitted by federal law is central to national labor policy.[12] See *Machinists* v. *Wisconsin Employment Relations Commission*, *supra*, 427 U.S. at 140, 147-148.

Second, while the state's interest in the "well-being of its citizens" (*Farmer*, *supra*, 430 U.S. at 303) would encompass concern for allegedly fraudulent hiring practices, in the present context that interest is plainly less compelling than the federal interest in regulating the rights and obligations of labor disputants. And unlike in *Linn*, where the activity in question—libel—was not regulated by federal law, here respondents' suit concerns a matter of significant federal interest—the terms of employment between an employer and employees subject to the NLRA.

Finally, the risk that the state cause of action would interfere with the effective administration of national labor policy has already been shown. The state action, if permitted to go forward, would impermissibly alter the balance of economic forces avail-

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[12] The Kentucky Court of Appeals stated (Pet. App. C 3) that federal interests are not implicated here because respondents are "non-union individuals who were not parties to the collective bargaining agreement entered into between [the Company and the Union]." That statement is incorrect. As shown (page 14, *supra*), the Union was the bargaining representative of the replacements, as well as the strikers, and the Company was not free to settle either group's terms of employment without bargaining with the Union.

able to labor and management by regulating conduct that Congress intended " 'to be controlled by the free play of economic forces' " (*Machinists* v. *Wisconsin Employment Relations Commission*, *supra*, 427 U.S. at 140). Moreover, the threat of such suits would chill the willingness of employers to settle strikes and pending unfair labor practice charges by agreeing to the reinstatement of strikers. It would consequently have the effect of prolonging strikes and litigation concerning unfair labor practice claims and thereby frustrate the Act's central policies favoring the expeditious and peaceful settlement of labor disputes.

CONCLUSION

The judgment of the Court of Appeals of the Commonwealth of Kentucky should be reversed.

Respectfully submitted.

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Docket Sheet

NO. 81-1966-CSX	TITLE	Belknap, Inc., Petitioner v. Duwaine E. Hale, et al.

DOCKETED	COURT
Apr. 24, 1982	Supreme Court of Kentucky

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Larry E. Forrester
	Counsel for Respondents:
Apr. 24, 1982	Petition for writ of certiorari filed. (Record filed).
May 21, 1982	Brief for the respondents in opposition filed.
May 24, 1982	Brief, amicus curiae, for The National Labor Relations Board in support of petition filed.
May 26, 1982	DISTRIBUTED. 6-10.
June 14, 1982	REDISTRIBUTED. 6-17.
June 21, 1982	Petition GRANTED.

July 15, 1982	Order extending time to file the joint appendix and petitioner's brief on the merits until Sept. 3, 1982.
Sept. 2, 1982	Joint appendix filed.
Sept. 2, 1982	Brief for the petitioner filed.
Sept. 3, 1982	Brief for NLRB as amicus curiae filed.
Sept. 3, 1982	Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae filed.
Sept. 7, 1982	Motion of The Chamber of Commerce of the United States of America for leave to file a brief as amicus curiae filed
Sept. 10, 1982	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct. 4, 1982	The motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae is GRANTED. The motion of the Chamber of Commerce of the United States of America for leave to file a brief as amicus curiae is GRANTED. The motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument is GRANTED.
Oct. 8, 1982	Brief of the respondents filed.
Nov. 17, 1982	CIRCULATED.
Jan. 11, 1983	ARGUED.